IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 163.

CENTRAL OF GEORGIA RAILWAY COMPANY,

Plaintiff in Error,

vs

WILLIAM A. WRIGHT,

Comptroller-General of Georgia,

Defendant in Error.

IN ERROR.

TO SUPREME COURT OF GEORGIA.

Judgment of Reversal Feb. 3, 1919.

MOTION FOR RE-HEARING.

JUDGMENT OF REVERSAL FEB. 3, 1919.

Now during said term of the court comes William A. Wright, Defendant in Error, and moves the court for a rehearing of said case, and especially in so far as the same concerns the Southwestern Railroad and the Muscogee Railroad involved therein, for the following reasons:

I.

The case involves three separate and distinct railroads, in opposite quarters of the State of Georgia, separately chartered by different Legislatures.

1. The Augusta and Savannah Railroad, in eastern Georgia, chartered by Act of Dec. 31, 1838 (Acts 1838, p. 174).

2. The Southwestern Railroad, in southwest Georgia, chartered by Act of Dec. 27, 1845 (Acts 1845. p. 132).

3. The Muscogee Railroad, in western Georgia, chartered by another Act of Dec. 27, 1845 (Acts 1845, p. 116).

The Muscogee Railroad was united with the Southwestern Railroad in November, 1868 (see Southwestern R. R. vs. Georgia, 54 Ga., page 411), under authority of the Act of March 4, 1856 (Acts 1856, p. 187), but its tax exemptions remained unaffected by the union:

Southwestern Railroad Company vs. Wright, 92 U. S. 676.

These charters are similar in that a limit was fixed to taxation of "the railroad and the property of said

company," "the railway and its appurtenances and all property connected therewith," and the "capital stock of said Railroad Company," respectively, it being stipulated that they should not be taxed "Higher than one-half of one per cent on the net annual income." They are alike in little else. While the first mentioned charter agrees that the railroad franchise may be rented out to others either wholly or partially to raise an income, the two other charters contain no such provision, but contemplate the operation of the roads by the respective owners alone.

The decision just rendered follows a decision respecting the same railroads in the case of Wright vs. Central of Georgia Ry. Co., 236 U. S. 674, treating it not as an adjudication of the present matter, but as controlling in its reasoning. The pregnant sentences in the short opinion just rendered are:

> "It presents another attempt to accomplish by a change in form what in Wright vs. Central of Georgia Ry. Co. 236 U. S. 674, was held to be an unconstitutional result * * * It was held that the statutes made the fee exempt from other taxation than that provided for, in favor as well of the lessee as the lessor. * * * We are of opinion that although the decision in the former case was necessarily confined to the question before the court, the reasoning applies with equal force to that now before us."

The reasoning referred to, which was employed also in the case of Wright vs. Louisville and Nashville R. R. Co. 236 U. S. 687, decided at the same time upon a lease from the Georgia Railroad and Banking Company, was based upon the peculiar provisions of the charters of the Augusta and Savannah Railroad Company and of the Georgia Railroad and Banking Company. These charters were granted about the same time, in language quite

similar, both were pioneer railroad enterprises, and both led out from Augusta. The important provision of each charter was that, after providing for a tax limited to one-half of one per cent on the net annual income, it was *in the same contract* agreed that the company might *make the income* not only by using the road itself, but also by renting the same out in part, or in whole. This was considered as indicating a purpose to treat all three ways as appropriate for making the income, and as *implying* that the tax would still remain on the lessor, and be measured by its income, rather than pass to the lessee, who would under later laws have to pay taxes ad valorem—a result that would destroy the tax covenant in carrying it out in one of the ways contemplated.

To quote the language of the court on the point:

> At page 678: "The charter of the Augusta and Waynesboro Railroad, afterwards the Augusta and Savannah, approved Dec. 31, 1838, alongside the taxing provision in Section 13 to which we have referred, provided as follows in Section 16: 'That said company shall at all times have the exclusive use of said railroad for the transportation of goods, wares, and freight of every kind, and passengers, over said railroad, so long as they see fit to use this exclusive privilege, and said company shall be allowed to charge the same rates for freight and passage as are allowed in the charter of the Georgia Railroad and Banking Company; Provided always that said company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation of freight or conveyance of passengers, with the privilege, to any individual, or individuals, or other company, for such term as may be agreed upon'—it being added that the persons or company so renting from said company shall 'so far as they act on the same be regarded as common carriers.'

"It will be perceived that when this section was drawn it was supposed that different persons might be allowed to put their carriages upon the new form or road, as perhaps may be seen more clearly in other early charters in Georgia and elsewhere, and the revenue that was to be derived from the exclusive privilege granted might be obtained by doing the whole business, by letting in others to share a part of it, or by making a lease of the whole. Any one of the three courses is permitted, one deemed as likely as another, and also, so far as appears, all standing alike in the mind of the legislature in respect of any legal effect upon the other grant of rights.

"The foregoing view of Section 16 would lead us to believe that no change in the matter of tax exemption was expected to follow from the demise of the road, any more than it would have followed from the admission of another carrier to partial rights, or of an individual to carry his own goods. But this is only an introduction to further consideration. We cannot suppose the legislature meant either to practice a cunning deception or to make a futile grant. Therefore, we are unable to read the charter as making the exemption vain by reserving to the state an unlimited right to impose on the lessee all that it had renounced as against the lessor. For that was to give the parties notice, if they were supposed to know the law, that the exemption would be lost if the income was earned in one of the ways contemplated; or if they were supposed ignorant, was to invite them to a bargain that was to have an unexpected and disastrous result."

The effort in this former case was to tax the lessee with the value of *the fee* in the property leased, the result of which would be to leave *nothing* taxable according to the charter. This is what is meant by the words, "reserving to the State the unlimited right to impose on

the lessee all that it had renounced against the lessor." In the present case, the *contract with the lessor is unaffected* by the proposed taxation of the lessee, for the lessor is still to pay its contracted tax on the income it receives by leasing the road. Only when the *interest acquired by the lessee,* because of improvements or otherwise, becomes *separately valuable,* is the lessee taxable additionally. Nothing is imposed on the lessee which was renounced as against the lessor.

The opinion at its close carefully states that it deals only with taxing *the fee* to the lessee.

The charters of the Southwestern and Muscogee Railroads were not quoted or discussed in the opinion, but were assumed to be the same as that of the Augusta and Savannah. Noting this, movant actually prepared a motion to rehear that case, but on consideration became convinced that the true law and justice of the case lay in taxing only the leasehold estate owned by the lessee to him, instead of the fee, the taxability of that interest had been intimated by the District Court judge, was all but conceded in the argument before this court, and was believed to be intimated by this court in the careful limitation of the judgment to the non-taxability of the fee. So the matter was allowed to rest. The unexpected application of the former opinion to this case, makes it necessary now to emphasize the utter inapplicability of the reasoning to the Southwestern and Muscogee charters, and to pray the court for a reconsideration of them.

III.

Between 1838 and 1845, an examination of the Acts of the Georgia Legislature will show that many railroads were chartered, with steadily diminishing privileges. No tax exemption whatever is believed to have been

granted after 1845. The permission to rent out in part or in whole the railroads which had been granted to the first companies, was not given to either the Southwestern or Muscogee company. The income, a percentage of which was to limit their tax liability, was to be made in *but one way,* by *running their own roads.* If the legislature had in mind the things attributed to it in 1838 in chartering the Augusta and Savannah Railroad, there is nothing to indicate that they did in 1845, when the latter railroads were chartered. These charters contain nothing to differentiate them from the numerous charters passed on by this court, containing *nothing* to indicate that the right of taxation was surrenderd as to *any property interest* which might by sale or lease pass to another.

See the Brief annexed.

IV.

The original contracts showing no purpose *to extend* the tax exemption to either a lessee or an assignee, neither a lease nor a sale being contemplated by the charters, has the legislature by *subsequent* act consented to such extension? The Act of 1852 (Acts 1852, p. 119) simply permitted leases to be made to a named lessee, the Central Railroad and Banking Company, of "their respective railroads for such term of time and on such other terms as they respectively may deem best." The *subject of taxation is not mentioned.* There is nothing whatever to show that anything but the *usual legal results* would follow upon making such a lease. Some of the roads to be leased had no tax contracts. While the Southwestern Railroad is mentioned in the Act, the *Muscogee is not.* The latter, as we have seen, did not unite with the Southwestern till 1868. It never connected with the Central. In the former opinion this court said of that Act:

"In the interval, the Rail Road had become a railroad; but we see no ground for believing that there had been any change in the attitude of the state towards the pioneer enterprises that it was encouraging a few years before."

This Act truly did not show any change in the charter privileges of the Augusta and Savannah Railroad. Equally it *showed no change* in the other charters. The original charters did not extend the tax exemption to any third party, and there is a total lack of language showing *expressly,* as is necessary, a purpose to extend it in this Act.

V.

But the Southwestern Railroad Company did not *act on this permission for seventeen years.* Not until *June,* 1869, did it lease its road thereunder. The permission might well have been considered *stale* by then. Certain it is that *three state Constitutions* had intervened. That of 1865 had adopted as law Irwins Code, which contains the scheme of ad valorem taxation still of force. That of 1868 had made such taxation not only law, but a part of the Constitution itself, prohibiting for the future both income taxation and exemption, except so far as these were fixed by irrepealable contract. The Act of 1852, whatever its meaning, can be considered only as *an offer* on the part of the State till it was acted on. (See Southwestern Railroad Co. vs. Georgia, 54 Ga. 402 (3) When acted on in 1869, the offer must be taken as *qualified* by the constitutional provisions then of force, and the Act could have no other or greater effect than if it had then just been passed. Its force in this matter is not that of *a law,* but of *a contract.* It could not be a contract, till its permission was accepted and acted on. If its results when acted on would be contrary to the state constitution, the latter prevails.

VI

In point of fact, the particular lessee named, the Central Company, also had a similar tax exemption. There was therefore no confusion to be apprehended, as all paid taxes alike. No practical question of the effect of the lease ever arose during the existence of that lessee, which perished in 1895. Nor did its interest ever become valuable before that time.

No permission to lease the Muscogee Railroad was ever given by the State at all. It did not permit, much less invite, the lessee to have anything to do with it.

VII.

The old Central went out of existence in 1895. Its receiver declined to keep up the lease of the Southwestern according to its terms. The lessor had no equipment, was a mere husk of a corporation, and could not have operated its railroad, and must have itself gone bankrupt, but the present Central Company was granted a charter by the State, permitting it to acquire the rights and privileges of the old Central Company, its predecessor, including the right to lease the railroads which the old Central had the right to lease. But this time the permission *was not silent* in the matter of taxation, but the law authorizing the charter expressly provided that no tax exemptions or privileges or immunities were to be allowed that were not common to all railroads, and according to the Constitution and laws of Georgia. (See Brief.)

Since under the laws of Georgia, when the interest of a lessee by reason of his improvements or other causes becomes separately valuable, such lessee owes taxes on his valuable interest, this lessee owes such taxes whether his interest be taken to date from June, 1869, or from

October, 1895, the date of the new lease. Instead of the State having decoyed it to an unexpected bargain, the State feels that its liberality has been abused. The present lessee was given permission to exist on the *distinct understanding that it would claim no immunities.* It has made the Southwestern Railroad a link in its mainline, so confusing its business with other railroads that it is impossible to know what its separate income is. It has become its virtual owner in perpetuity, with the right to add to it by improvements indefinitely. Its value is now twice what is represented by its rental, fixed by the capital stock. The lessor will continue always to pay a fixed tax, limited by the percentage on the lease money. It has no interest in this contention and is taking no part. It will likely never have the opportunity to lease its road again. If it does, it should demand and receive its full value for rent, in which case the leasehold interest will again have no value. It has *no right* to lease in its charter.

VIII.

The question is not stale. There was no tax due on the leasehold till it *became valuable.* It was not known to be valuable till just before this litigation started.

With apologies to the court for not having made plain heretofore the distinctions here urged, it is very earnestly prayed that matter be reopened that they may be fully presented. A memorandum of law is appended for the aid of the court in the consideration hereof.

Respectfully submitted.

SAMUEL H. SIBLEY,
Counsel for Defendant in Error.

We, of counsel in the foregoing case, certify that in our opinion the foregoing grounds for a rehearing of said case are meritorious, and that justice demands a rehearing thereof.

BRIEF OF LAW IN SUPPORT OF MOTION TO REHEAR.

The lessee has a taxable interest in the Southwestern and Muscogee Railroads by virtue of its long lease, which is subject to ad valorem taxation under Georgia law if valuable. This will be taken as settled by the decision of the State Supreme Court, no federal question being involved.

If this interest is not taxed, it must be because either the lessee is exempt from ad valorem taxation, or because the lessor is.

I.

It is not contended that the lessee has or could have any exemption from the governmental power of taxation, having taken its charter under a Constitution and laws which prohibit it:

Rochester vs. Rochester, 205 U. S.

Great Northern R. R. vs. Minnesota, 216 U. S. 206.

As it is not the fee in the property, which the lessee does not own, but only the leasehold interest which it does own, that is now sought to be taxed, it would seem that unless it has an exemption, it must pay its own taxes on its own property.

II

A holding to the contrary must be based on a contention that as the *lessor* has an exemption from ad valorem taxation, by irrepealable contract (which is admitted) that it will follow and protect *an interest* in its property when *conveyed by a lease* to another. This is not law, generally, as has been several times decided:

Jetton vs. University of the South, 208 U. S. 489.
Morris Canal Co. vs. Baird, 239 U. S. 126.

It is in *principle* not distinguishable from the case of a conveyance of *all* interests in the property. Whatever is conveyed to another, be it an interest great or small, is no longer protected by the contract exemption of the grantor, unless it is plainly agreed otherwise by the State either in the original contract, or a subsequent assent to the conveyance. In case *of silence*, the settled construction is that the contract was meant to protect the property only while belonging to the contractee, and that the contract, while mentioning the property, is to be understood as intended to *be personal* to the original party to the contract.

The State's consent to the contract protecting any other person must appear by express terms, and not by implication, even the use of the words "Powers and privileges" in a consent to a transfer not extended to a tax exemption.

Morgan vs. Louisiana, 93 U. S. 217.

Wilson vs. Gaines, 103 U. S. 417.

L. & N. R. R. vs. Palmes, 109 U. S. 244.

Memphis R. R. vs. Commissioners, 112 U. S. 609.

C. & O. R. R. vs. Miller, 114 U. S. 176.

Picard vs. E. T. V. & G. R. R., 130 U. S. 637.

St. Louis & F. R. R. vs. Gill, 156 U. S. 649.

Norfolk & W. R. R. vs. Pendleton, 156 U. S. 667.

Phenix Ins. Co. vs. Tennessee, 161 U. S. 174.

Rochester vs. Rochester, 205 U. S. 236 passim.

So early as 1830 Chief Justice Marshall said:

"That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State

may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, the community has the right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear."

Providence Bank vs. Billings, 4 Peters, at page 561.

This doctrine has never been departed from, but has been always applied both to original contracts of exemption, and to claimed extensions of them to others than the original contractees.

"This salutary rule of interpretation is founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and common right, and therefore, not to be extended beyond the express and exact requirements of the grants, construed *strictissimi juris.*"

Memphis R. R. vs. Commissioners, 112 U. S. 609.

"If the legislature can lay aside a power devolved upon it for the good of the whole people of the State, for the benefit of a private party, it must speak in such unmistakable terms that they will not admit of any reasonable construction consistent with the reservation of the power."

Picards vs. E. T. R. R., 130 U. S. 637.

Let it be granted that the language in the charters of the Augusta and Savannah Railroad Company, and Georgia Railroad and Banking Company (which was construed in the cases of Wright against these companies in 236 U. S. 674 and 687), which by arranging in the very contract of exemption for a use of the railroads by lease,

justifies the conclusion that the legislature intended beyond a reasonable doubt to lay aside the power to tax the lessee. *There is no such language in the charters of the Southwestern and Muscogee Railroads.* A lease of the railroad *was not contemplated* by either party in making the tax contract, any more than *a sale* of it. These latter charters afford no ground to conclude that a lease was contemplated.

III.

When by a *subsequent* permission of the State *a sale* of the property is had, the grantee pays taxes on his interest in the property according to *his tax status* and that of the grantor.

> "A legislative authorization of the transfer of the 'property and franchises' * * * of the 'property' * * * or the 'charter and works' * * * or of the rights of 'franchise and property' * * * is not sufficient to include an exemption from the taxing or other power of the State, and it cannot be contended that the word 'estate' has any larger meaning."
>
> "Although the obligations of such a contract are protected by the Federal Constitution from impairment by the State, the contract itself is not property which can be transferred by the owner; being personal to him with whom it was made, it is incapable of assignment. The person with whom the contract is made by the State may continue to enjoy its benefits unmolested, but there his rights end. He cannot *by any form of conveyance* transmit the contract or *its benefits* to a successor."
>
> Rochester vs. Rochester, 205 U. S. 247.

And this principle was held to apply to the case of *a lease*:

> "This act merely permitted the lease of the 'Canal of said company or any part thereof, with all or any part of its boats, property, works, appurtenances, and franchises,' and as clearly pointed out in the Rochester case, an exemption from taxation does not pass under a valid lease or sale of corporate property together with the appurtenances and franchise."
>
> Morris Canal Co. vs. Baird, 239 U. S. at page 133.

The Act of 1852 merely permitted the companies to "lease their respective railroads for such term of time and on such other terms as they respectively may deem best." There is no word whatever indicating that *anything but the general* law would apply to the taxation of the interest acquired by the lessee. Not even the "Privileges and franchises" are mentioned—only the railroads are to be leased.

IV.

And this *was not acted on till* 1869, after the present ad valorem taxation had been established by the Constitution and laws of Georgia:

Irwin's Code of 1865, sections 797 and following. This Code was made law by the Constitution of 1865, Art. V, Sec. 5.

Constitution of 1868, Art. 1, Sec. XXVII, which established uniform ad valorem taxation.

> "The authorities are numerous and conclusive that no corporation can receive by transfer from another an exemption from taxation or governmental

regulation which is *inconsistent with its own charter* or *with the Constitutionand laws then applicable;* and this is true even though under legislative authority the exemption is transferred by words which clearly include it."

Rochester vs. Rochester, 205 U. S. 247.

No contract exists till the law proposing it *is acted on*:

Buffalo Railroad vs. Falconer, 103 U. S. 821.
Southwestern Railroad vs. Georgia, 54 Ga. 402 (3).

If between the legislative Act and the action upon it, changes occur in the Constitution or laws affecting the subject matter, the Act is to that extent qualified, and a contract cannot be formed contrary to them:

Southwestern Railroad Co. vs. Georgia, 54 Ga. 402.

L. & N. R. R. vs. Palmes, 109 U. S. 244.

Memphis R. R. vs. Comrs. 112 U. S. 609.

Yazoo Co. vs. Adams, 180 U. S. 1.

Great Northern Co. vs. Minnesota, 216 U. S. pages 225 to 231, where the cases are collected and reviewed. viewed.

The second lease of 1895 was to the present lessee, *in the charter of which,* by reference to the law under which the incorporation proceeded, is the provision:

"*Provided* that nothing in this article shall be construed to reserve any exemption from taxation, either state, municipal or county, or any special rights, privileges or immunities that are not herein

authorized to be granted to each and all railroads alike, in conformity to the present Constitution of Georgia."

Code 1910, Sec. 2585 (11) codified from Act 1892.

V.

The exemption from taxation of the lessee on his leasehold interest does not result from the consideration that it would enhance the income from leases to the lessor. This was considered as to property which *could only be used* by leasing it:

"If the University could lease its lands and also provide effectually that the interest of the lessees should be exempt from taxation, it may readily be seen that the amount of rental which it would receive would be larger than if no such exemption could be obtained, but that is a matter which is wholly immaterial upon the question of impairment of the contract of exemption that was really made. That contract cannot be extended simply because so construed it would add to the value of the exemption. The language used does not include the exemption claimed."

Jetton vs. University, 208 U. S. 501.

What language used, either in the charters of Southwestern Railroad and Muscogee Railroad, or the Act of 1852, or of 1892, includes the exemption here claimed—the exemption of the lessee as to his lease interest?

VI

Does the mere fact that *income* is made material in *measuring the limited tax* of these corporations give them the right to extend their contract to others? This would be in accordance with no principle of construction.

It could not have been the purpose of the contracting parties, for in these charters neither lessees nor assigns were in contemplation. It is worthy of notice that they are not taxed on their incomes, but it is agreed only that that the "railroad and its appurtenances" of the Southwestern, and the "capital stock of said company" in the case of the Muscogee, "shall not be *taxed higher* than one-half of one per cent upon its net annual income." This tax under present constitution and laws of Georgia is a *property tax,* but it cannot be assessed as to these companies ***higher than the limit fixed*** for each year. If the property tax on the value of their property should happen to be less than one-half per cent of the net income for that year, they would have to pay only the amount that the laws called for as a property tax. They have *never agreed* to pay *one-half of one per cent of their income,* and there is *no law requiring* it. It is only because their property tax would be more, that they pay so much as one-half of one per cent of the income. Because they have this limit fixed for their tax liability, why should they be able to arrange to let others go scot free?

Special forms of taxation, rather than complete exemption, were involved in the cases cited below, but the rules against implied extension of the contract to others than the original contractee were rigidly enforced.

Phenix Ins. Co. vs. Tennessee, 161 U. S. 174.

Yazoo Co. vs. Adams, 180 U. S. 1.

Great Northern vs. Minnesota, 216 U. S. 206, where *an income tax* of 3 per cent was involved.

The same rule of interpretation was announced as to this very Southwestern Railroad charter:

"The surrender of the power to tax will *never*

be presumed, but must be shown by clear and unambiguous *language* which will admit of no other construction."

Southwestern Railroad Co. v. Georgia, 116 U. S. 231.

VII.

And it is a mistake to say that the protection of the lessee from taxation is *necessary to protect the lessor in his contract,* for this additional reason: So long as the lessee in making his lease *pays the full value for rent of* the property, his lease *has no market value* and would not be taxable. It is only when by some combination of circumstances *after the lease* this ceases to be true, as here, that any value, and hence any liability to taxation arises. To tax such value, whether due to improvement of the property by the lessee or any other cause, does not hurt the lessor, and is only just to the lessee. The lessor in this case probably will never again have the opportunity to lease this property, but if so, it can and should have *the full value for rent* of the property, in which case the lessee will owe no tax on the leasehold, for it will not be valuable on the market.

Where a leasehold, by reason of improvement or otherwise, becomes valuable, the rule has always been that the leasehold and improvements are taxable to the lessee, though the lessor be exempt:

P. W. and B. R. Co. vs. Baltimore, 50 Md. 397.

VIII

It is right that these charters have operation according to the true intent of the parties. The Southwestern Railroad Company has leased its property for its then rental value, practically forever. It is due to pay taxes

on its interest therein not higher than one-half per cent of its net annual income therefrom, a fixed amount. *It is content, and makes no complaint here.*

Its lessee having secured practical ownership of the railroads, has improved and developed them to double their value absolutely, and for rent, and will continue to develop them. Its interest has therefore become nearly as valuable as that of the lessor. It may enjoy or sell that interest, pocketing the proceeds. Why does it not owe taxes? How has the State promised that it should not? Was not the contrary stated in its very charter?

These charters of the Southwestern and Muscogee Railroad Companies being fundamentally different from those of the Augusta and Savannah and Georgia Railroad and Banking Companies, it is confidently urged that the distinction should be observed in the decision of this court.

Respectfully submitted,

SAMUEL H. SIBLEY,

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Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 80.

CENTRAL OF GEORGIA RAILWAY COMPANY,
Plaintiff-in-Error,

vs.

WILLIAM A. WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA,
Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR ON THE REHEARING.

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SYNOPSIS.

TABLE OF CASES.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 30.

CENTRAL OF GEORGIA RAILWAY COMPANY,
Plaintiff-in-Error,

vs.

WILLIAM A. WRIGHT, Comptroller General of the State of Georgia,
Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR ON THE REHEARING.

I.

We still earnestly insist upon the proposition that we are denied equal protection of law in that this leasehold alone is singled out for taxation, while it is the settled practice of the tax authorities in Georgia not to tax leasehold interests separate from and in addition to the property itself.

If the proposition of the impairment of the obligation of the contract should be decided against us, then this proposition of denial of equal protection of law must be considered.

The point of denial of equal protection of law is covered by Assignments of Error 1, 2, 3, 4 and 5 (which are quoted in our original brief at pages 7-10), and the point is discussed in our original brief under headings X to XV, both inclusive. The

fact that this is the only leasehold which is taxed in Georgia is practically conceded. The failure to tax all other leaseholds is not merely accidental or sporadic, but is the settled policy and practice of the tax authorities of the state. They conceded that property is taxed *in solido,* and that separate interests are not separately taxed, that when the value of property is taxed to its owner, the leasehold interest is not taxed in addition.

But the contention of the State is that the taxation of this leasehold is justified because the State has not taxed the railroad on its value and the only way in which its value can be reached is by taxing the leasehold. As Counsel for the Comptroller General in his original brief at page 18 says, the situation of the lessee is "unique", and the Supreme Court of Georgia in its decision (Record, p. 84) says it is "anomalous". In other words, the State of Georgia having solemnly contracted to tax this railroad not higher than one half of one per cent. on its net income, and having received the full amount of taxes to which it is entitled under its contract, uses this as an excuse or justification for taxing the Central Railroad with the leasehold interest. The quality of this lease is no different from many other leases; the fact that it relates to a piece of property which the State cannot tax as it can tax other property is used by the State to differentiate this leaseholder from all other leaseholders. It is conceded by the State that if the lease was of a railroad which was taxable *ad valorem* as other property is taxed that the leasehold would not be taxed by the State.

The Comptroller General has at least been consistent in his theory because he has not taxed the leasehold interest in those portions of the South Western Railroad which are not covered by tax provision of the charter. Although the lease itself is

indivisible and covers all the lines of the South Western Railroad, he taxes the Central only with the leasehold interest in the charter tax lines (198.72 miles), and does not tax the Central with the leasehold interest in the other lines of the South Western (130.87 miles). The manner in which the Comptroller General has proceeded we say is consistent with his theory, but it emphasizes the fact that the taxation of the leasehold interest of the Central in the railroad property would never had been attempted if the State had not estopped itself by its own contract from taxing this property except on the income basis. The contract should be a shield and buckler to the leasehold and not a spear to transfix it with the tax. No other leaseholder in Georgia is required to pay a tax on his leasehold, but this leaseholder must because it leased a piece of property which the state contracted was exhaustively taxed when it paid the maximum rate fixed by its charter! This seems to us to be a palpable case of denial of equal protection of law.

II.

The tax limitation is annexed to the Railroad property itself and is not merely a personal exemption to the Railroad Company.

This question is discussed in Point III of our original brief.

Only certain specific lines of the South Western Railroad have the tax limitation.

Wright v. *South Western Railroad Co.*, 64 Ga. 783;

South Western Railroad Co. v. *Wright*, 116 U. S. 231.

The property generally of the South Western Company has no tax limitation. The provision of the charter is "that the said railway and its appurtenances and all property therewith connected" shall not be subject to be taxed, &c.

To illustrate: the line from Americus to Albany became a part of the South Western under the Act of December 19th, 1859 (Acts 1859, p. 329) the second section of this Act provided "That the said railroad from Americus to Albany shall be considered part and parcel of the South Western Railroad Company and be liable to pay to the state the same tax that the rest of the South Western Railroad Company is liable to pay, and such additional tax as the legislature may hereafter impose."

The Act of December 18, 1860 (Acts 1860, p. 197), under which the line from Albany to the Chattahoochee River was constructed has substantially the same provision. The Act of December 10th, 1860, which authorized an increase of $500,000 to the capital stock of the South Western Railroad provided "That such increased capital stock of said South Western Railroad Company authorized by this Act, as may from time to time be used by said Company for railroad purposes shall pay the same rate of tax to the state as is or shall be payable to the state by individuals on their property."

The Supreme Court of the United States in *South Western Railroad Company* vs. *Wright,* 116 U. S. 231, 235, called attention to the unusual character of the tax limitation in these words: "The language of the exempting clause is somewhat unusual. It is not that the Company or its stock shall be taxed in a certain way and otherwise exempt, but that the said Railway and its appurtenances, and all property therewith connected shall not be subject to be taxed higher," &c.

In *Wright* vs. *Georgia Railroad,* 216 U. S. 420, 432, it was held that the tax on net earnings was inconsistent with any other form of taxation and that "when the state gave up the right to levy and collect a property tax and to take in substitution therefor a tax upon annual net profit it gave up the right to tax the franchise of the company as certainly as it gave up the right to tax its railroad".

In *Columbus Railway* v. *Wright,* 89 Ga. 574, 581, it was decided: "The real question is, can railroad property which is taxable only on the income system, be subjected to any further taxation after the state has already exacted for state purposes the full limit of taxation authorized by the charters of the companies owning such property? The question must in our opinion be answered in the negative."

III.

The rental which the lessor receives is not the measure of the tax under the Charter, but the net income produced by the railway and its appurtenances.

The Comptroller General in his original brief and also in his brief on the motion for Rehearing (see top, p. 6) contends that the rental which the lessor receives is the thing which is taxed under the Charter.

It has been the uniform practice of the taxing department, ever since the leases have been in effect (about 50 years) to tax the net income from the operations of the property and not the rental. The Supreme Court of Georgia decided 38 years ago in *Goldsmith* v. *Augusta & Savannah Railroad,*

62 Ga. 468 (H. N. 3) that the rental was not taxable. Counsel for the Comptroller General says that this decision was obiter. It was, but it was correct and squared with the practice and with the unambiguous language of the Charters. There is not the slightest foundation for the contention that the rental received by the lessor is taxed by the Charter. The language of the South Western Charter is "that the said railway and its appurtenances and all property therewith connected shall not be subject to be taxed higher than one per cent. upon its net annual income", the net income referred to is manifestly the net income from the operation of the railway, not the arbitrary amount which the Railroad Company may fix by contract for the rental of its railroad.

The Charter of the Muscogee Railroad Company is ever more emphatic. After providing for the tax on net income the charter provides "nor shall any other tax be levied or collected on the stock of said Company".

The theory of the Comptroller General is that by taxing the rental and then by capitalizing the net earnings of the property minus the rental and taxing the Lessee with this latter amount on the *ad valorem* basis, that thus the State will receive full taxes from this railroad property and do equity to all parties. It does not seem to make any difference to the Comptroller General that his theory is contrary to the unbroken practice of fifty years and that it is contrary to the plain language of the contract. It suits his theory to maintain that the rentals are taxable and that is about all there is to the contention.

Again on page 10 of his brief the Comptroller General says: "It has made the South Western Railroad a link in its main line so confusing its

business with other railroads that it is impossible to know what its separate income is. It has become its virtual owner in perpetuity with the right to add to it by improvements indefinitely. Its value is now twice what is represented by its rental, fixed by the capital stock. The lessor will continue always to pay a fixed tax, limited by the percentage on the lease money". The practical difficulty in ascertaining the net income has nothing to do with the question of taxability. The net income of the South Western is ascertained and returned for taxation and if it is not satisfactory to the state it has the right to reject the return. The lines of the South Western covered by the lease are some of them taxable according to income and others according to value (Record, p. 13). If the South Western operated its own property, the net income of the particular lines covered by the charter limitation as to taxes would have to be estimated.

The statement that the lease is twice the value of the property represented by the rental is not justified by the record and is not correct. The probability is that the lessee does not at this time receive enough net income to pay the rental.

Whatever improvements the Lessee may have put on the property helps to make the net income. If the property had not been improved there would be no net income.

The additions and betterments are not taxable.

Wright vs. *L. & N. R. R.*, 236 U. S. 687 (H. N. 3).

The exemption continues even if the property appreciates in value. The measure of the tax is the net income.

Wright vs. *Georgia Railroad*, 216 U. S. 420 (H. N. 6).

The statement "The Lessor will continue always to pay a fixed tax limited by percentage on the lease money", is contrary to the continuous practice for fifty years and to the plain language of the charter. The charter did not give the Lessor the right to arbitrarily fix the amount of its tax. The tax depends on the net income of the particular railway and its appurtenances covered by the tax limitation in the charter. The lease money which the lessor receives is not only the rental of the lines taxable on the income basis, but covers the lines taxable on the *ad valorem* basis.

IV.

When the Lease of the South Western was made in 1869, there was nothing either in the constitution or laws of the State of Georgia which affected either the power to lease or the tax provision of the charter.

The Act of 1852 authorized the lease in unequivocal terms. No time was set within which the lease should be made. Counsel for the Comptroller General in his brief on the motion for rehearing, page 8, says: "But the South Western did not act on this permission for seventeen years. Not until June 1869 did it lease its road thereunder. The permission might well have been considered stale by then." Why should it have been considered stale? There was no law or constitutional provision when the lease was made in 1869 which even remotely affected the power of lease conferred by the Act of 1852. Counsel for the Comptroller does

not venture the assertion that the power was stale nor does he cite any law to sustain such a contention. He merely by way of inuendo suggests. "The permission might well have been considered stale by then." The Macon and Western Railroad was leased to the Central Railroad in 1871. This lease was attacked in the case of *Central Railroad* v. *Mayor and Council of Macon,* 43 Ga. 605, on a multiplicity of grounds, but no one ventured the suggestion that the power had become dormant or stale. The validity of the lease was upheld by the Court as valid under the Act of 1852.

Counsel for the Comptroller proceeds in his brief on the motion for rehearing, page 8, to suggest that between the time the Act of 1852 was passed and the time the Lease of 1869 was made that three State Constitutions had intervened and that the tax provision of the Charters and the Leasing Act of 1852 had become qualified or affected. He does not disclose just how they had become qualified or affected, but leaves that unexplained.

The Code of Georgia of 1861, §1636, and the Code of Georgia of 1863, §1682, provided, "In all cases of private charters hereafter granted the state reserves the right to withdraw the franchise unless such right is expressly negatived in the charter." There was also another provision code of 1863, §1683, as follows: "Private corporations heretofore created without the reservation of the right of dissolution, and where individual rights have become vested are not subject to dissolution at the will of the legislature."

These were the only statute laws in force when the Lease of the South Western was made in 1869 which could even remotely affect the charter or the Act of 1852. We cannot perceive how they do have any effect upon or connection with either the

original charter or the Act of 1852, both of which were passed anterior thereto. The code section by its terms relates only to *Charters hereafter* granted by the State, and simply provides that the right of repeal is reserved unless it is expressly negatived in the grant.

Nor do the Constitutions of 1861, 1865 or 1868 touch the original Charter of the South Western or the Act of 1852.

In 1874 the State of Georgia passed an Act to tax the Central Railroad and Banking Company of Georgia and the South Western Railroad and all the other railroads in Georgia which had tax exemptions, on the *ad valorem* basis. The Central Railroad and the South Western Railroad both claimed that they were taxable under their respective Charters only on the income basis and no higher than one half of one per cent., and accordingly brought suit to prevent the levy of taxes under the Act of 1874. The Macon and Western Railroad and the Central Railroad were consolidated under the Act of 1872, and it was contended that an entirely new corporation was created by the Act of 1872, and that therefore the code section 1682 of the code of 1863 above quoted, applied and the state had thereby reserved the right to withdraw the immunity from taxation. This contention was upheld by the Supreme Court of the State of Georgia in the case of *Central Railroad* vs. *State,* 54 Ga. 401, but was reversed by the Supreme Court of the United States in *Central R. R.* v. *State,* 92 U. S. 665. In the case of the South Western Railroad a union and consolidation of the South Western Railroad and the Muscogee Railroad was authorized by the Act of 1856, but before it went into effect the assent of the stockholders of both companies was required. The assent of the stockholders was not had until No-

vember, 1868. It was claimed that a new corporation was created by the Act of Union and Consolidation, and as it did not take effect until 1868, that the Code of 1863 applied, and that the right to withdraw the immunity from taxation was conferred by the Code of 1863. This contention was upheld by the Supreme Court of Georgia in the case of *South Western Railroad* vs. *State,* 54 Ga. 401, and reversed by the Supreme Court of the United States in *South Western Railroad* vs. *State,* 92 U. S. 676, holding the Charter to be an irrepealable contract and that no new corporation had been created by the Act of 1856, and that therefore the code of 1863 did not apply and open the Charter to amendment or repeal.

Now if there had been anything in the Constitutions of 1861, 1865 or 1868 which affected the irrepealable character of the Charter of the South Western, the Counsel who represented the State in the case would have been quick to see and urge it. It was not suggested by Court or Counsel that the Constitution had anything to do with the case. The Constitution of 1868 had gone into effect in April, 1868, and the assent of the stockholders to the consolidation of the South Western and Muscogee Railroads was given in November, 1868, so the Constitution was then in effect. Among the Counsel for the State in this litigation was Robert Toombs who was the reputed author of Article IV of the Constitution of 1877 which prohibited the legislature from making an irrevocable grant of immunity from taxation, and who was a member of the Constitutional Convention of 1877, and if there had been anything in the Constitution of 1868 which affected the irrepealable character of the charters of the Southwestern and the Central, he would have certainly urged it. The constitu-

tional limitation upon the right of the legislature to make an irrevocable contract with reference to taxation first appeared in the Constitution of 1877; there was absolutely nothing in the Constitution of 1868 or prior constitutions which even squinted at such a limitation.

It will also be noted that while the Act of Union and Consolidation of the Muscogee and South Western Railroads was passed in 1856 and not acted on until November, 1868, that neither the Supreme Court of Georgia nor the Supreme Court of the United States intimated that the power had become stale. The union of the two railroads did not take place until after the constitution of 1868 went into effect, and if the Constitution of 1868 did not affect the irrepealable charter of the South Western, how does it affect the question of the lease authorized by the Act of 1852 and not consummated until 1869?

The Constitution of 1868, Art. 1 Par. 27 (Code of 1873 § 5018) provides "The power of taxation over the whole state shall be exercised by the General Assembly only to raise revenue for the support of government, to pay the public debt, to provide a general school fund, for common defense and for public improvement; and taxation on property shall be *ad valorem* only and uniform on all species of property taxed."

This merely announces a constitutional rule of taxation for the future, it does not pretend to repeal charter provisions previously enacted inconsistent with it. The Supreme Court of the United States has decided in the 92 U. S. 676 that the Act of 1874, which attempted to repeal the tax provision of the charter of the South Western was unconstitutional and that the charter was an irrepealable contract with the state. The lease was in

effect at this time, having been made in 1869. It is inconceivable that a lease made in 1869 under authority granted in 1852 opened the tax provision of the charter to repeal or affected it in any manner. The power of the South Western Railroad Company under the Act of 1852 to lease its railroad to the Central Company was not cut down or impaired or lessened by the Constitution of 1868. No different consequences could ensue from a lease made in 1869 than from a lease made in 1852. The South Western by leasing its property did not expose itself to a revocation of its charter, nor did the Central by taking the lease in 1869 stand in any different position from what it would have stood in if it had taken it in 1852. No new charter was granted by the Act of leasing in 1869 so as to bring the case within § 1682 of the Code of 1863; nor because the Constitution of 1868 provided that thereafter property shall be taxed *ad valorem* and uniform on all species of property taxed did the previous contract with the South Western become repealable. Article XI Par. 3 of the Constitution of 1868 (Code 1873, § 5145) is merely a recitation of the laws of force in Georgia, among them being the Code of 1861 as amended to date. A reading of Paragraph V of the brief of the Comptroller General on his motion for rehearing would give one the impression that the Code had become a part of the Constitution. There is absolutely nothing in the Constitution of 1868 which affects either the original charter of the South Western or the Act of 1852.

V.

The Georgia Constitution of 1877 does not and cannot impair the obligation of the previous contract contained in the original charter and the Lease Act of 1852.

This Constitution is the one now in force. Art. VII, § 2, Par. 1 (Code, § 6553), provides that all taxation of property shall be uniform and *ad valorem*. Art. VII, § 2, Par. 4 (Code, § 6556), prohibits the exemption of property from taxation except that which is specially enumerated in the Constitution.

Art. VII, § 2, Par. 5 (Code, § 6557), provides, "The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party."

Art. I, § 3, Par. 2 (Code, § 6389), prohibits the legislature from making "irrevocable grants of special privileges".

Art. IV, § 1, Par. 1 (Code, § 6462), prohibits the irrevocable grant, limitation or restraint of the sovereign and inalienable right of taxation.

Art. IV, § 2, Par. 1 (Code, § 6465), provides that any alteration or amendment of a charter shall operate as a novation and bring the same under the provisions of the Constitution. All of the constitutional provisions were passed subsequent to the original charter of the South Western and the Leasing Act of 1852 and consequently cannot impair the rights vested thereunder.

As the Court observed in the decision of this

case, "But the constitution was subsequent to the charters that created the exemption and must yield to them if they apply to the present attempt."

Central of Georgia Ry. Co. v. *Wright,* 248 U. S. 526.

But the Constitution of Georgia itself upheld and preserved the contracts which it had previously made.

Art. IV, § 2, Par. 6 (Code, § 6468), provides, "No provision of this Article shall be deemed, held or taken to impair the obligation of any contract heretofore made by the State of Georgia."

The Certificate of Incorporation of Central of Georgia Railway Co. is granted subject to Article IV, and the petition for incorporation specially mentions the Act of 1852 (Record, p. 73).

Art. I, § 3, Par. 3 (Code, § 6390), also provides, "No grant of special privileges or immunities shall be revoked except in such manner as to work no injustice to the corporators or creditors of the corporation." Thus the Constitution of 1877 carefully preserved the contracts of the State theretofore made.

VI.

There is nothing in the charter of the Central of Georgia Railway Company which estops it from making the point of impairment of the obligation of the contract.

It is urged that code §2588 (11) which is the section under which the present Central Company was incorporated as the successor of the Central Railroad

and Banking Company of Georgia is estopped by the *proviso* in said section which is as follows: "That nothing in this article shall be construed to reserve any exemption from taxation, either state, municipal, or county, or any special rights, privileges and immunities that are not herein authorized to be granted to each and all railroads alike, in conformity with the present Constitution of Georgia." This code section and others cognate thereto are printed with appendix of our original brief.

The Central Railroad and Banking Company of Georgia had a tax provision in its Charter similar to the Augusta and Savannah Charter, and when the purchaser of its property at judicial sale was organized as the Central of Georgia Railway Company under the provisions of the statute above quoted this tax exemption was unquestionably lost and it has never been contended otherwise.

The contract, as to the impairment of which we are complaining, does not arise out of the Charter of the Central Railroad and Banking Company of Georgia or the Central of Georgia Railway Company, but arises out of the Charter of the South Western Railroad Company and the Muscogee Railroad Company, in connection with the Act of 1852. We say that under those Charters it was contracted that these particular railroads should not be taxed higher than one per cent. on their net income and that this provision was annexed to and inhered in the property itself, and that when the maximum tax was imposed the power of the State to tax this property was completely exhausted; that a leasehold interest is an interest in the property and if this interest is taxed the property itself is taxed. The Supreme Court of Georgia in its decision of this case (146 Ga. 401, Record, p. 77), made it clear that when the leasehold is taxed the property itself is

taxed. See the quotation from the decision in our original brief, pages 31 and 32. The lease of the property did not open up the property for taxation. We do not rely upon any special immunity or privilege or exemption in the Charter of the Central of Georgia Railway Company. The leasehold would not be taxable if the property had been leased to any other person or corporation which had the power of lease, because this property had been set apart for taxation not higher than one half of one per cent. on its net income. The net income might be made by the operation of the property by the South Western Company, or in case the legislature authorized a lease of the property then the net income might be made by the lessee. (We have previously argued that the rental was not the measure of the tax.) The original lease was made in 1869, under the Act of 1852, which specially authorized a lease to the Central Railroad and Banking Co. of Georgia. This leasehold interest was sold at judicial sale and the purchaser organized the Central of Georgia Railway Company under Code §§2585 (11), (12), 2586, which vested the New Company with all the powers of the Old Company. The lease was then modified and renewed in 1895 to the New Company.

The leasehold interest of the Central Railroad and Banking Company of Georgia, the original lessee, was not taxable, not because there was anything in its charter that relieved it from taxation, but because the South Western Railroad's charter provided that the railway when taxed one half of one per cent of its net income was exhaustively taxed. In what respect has the situation changed in so far as the Central of Georgia Railway Company, the successor, is concerned. The railway is precisely the same railway and it is covered by precisely the

same charter and the power of lease is derived from the same Act of 1852.

No one has ever contended that the Act of 1852, or Section 16 of the charter of the Augusta and Savannah which authorizes that Company to farm out and lease its railroad, contained any exemption from taxation. The decision of this Court is that the charter exemptions were peculiar and taken in connection with the power to lease conferred by the charter, that the leasehold could not be taxed without impairing the contract.

The new Central Company also had the general power to lease under the laws under which it was incorporated in 1895.

Code, §§ 2591, 2597.

We refer to the Act of 1852 because from thence was derived the power of the South Western to make the lease and the power of the old Central Company and its successor the new Central Company to take and hold the lease. We refer to the fact that the original lease was made in 1869 and to the further fact that it was modified and renewed in 1895 to show the continuity of the transaction and to show that the power of lease was exercised before the Constitution of 1877 was born. The South Western Railroad Company has never operated its property since 1869.

The provision in the statute for the incorporation of purchasers of railroads that the new company could not take any exemption or immunity from taxation which the old company might have had cannot be construed to open up the South Western Railway to taxation, because its immunity from taxation does not depend in any sense upon the charter of the Central R. R. & Bkg. Co. of Ga. The leasehold interest of the old Central Company in

the South Western Railway was not taxable, not because of any exemption or immunity therefrom in the charter of the old Central Company, but because the railway itself was protected from taxation of any kind or form after the one-half of one per cent. on its income was paid. When the new Central Company contests its liability to be taxed on the leasehold interest, it does not rest its case on any exemption or immunity from taxation in the charter of the old Central Company. The old company had no exemption from taxation in its charter, except as to its railroad from Savannah to Macon.

In our original brief under Point VIII, pages 34, *et seq.*, we argue and cite authorities to the effect that as Lessee we have the right to make the point of the impairment of the obligation of the contract, although the contract may not be in our charter.

Attention is called by counsel for the Comptroller General in his original brief (p. 30) to the fact that the certificate of incorporation of the Central of Georgia Ry. Co. is granted subject to Article IV of the Constitution. All that we have said above applies with equal force to Article IV of the Constitution which prohibits the Legislature from granting away the right of taxation and which provides that any amendment of the charter subjects it to the provisions of the Constitution. This Article IV also contains the provision that "No provision of this article shall be deemed or held or taken to impair the obligation of any contract heretofore made by the State of Georgia."

VII.

There is no substantial distinction between the case of the Augusta & Savannah Railroad and the case of the South Western Railroad.

Counsel for the Comptroller General in his brief on the motion for rehearing argues that there is a distinction between the Augusta & Savannah case and the South Western case, in that in the former the power to lease and the tax provision are both in the original charter, while in the latter the tax provision is in the original charter, and the power to lease is in the Act of 1852, which last Act he says is merely permissive. This is rather a shadowy distinction upon which to rest the question of taxation which looks rather to the substance of things.

The power to lease contained in the 16th section of the charter of the Augusta & Savannah has no more sanctity because it is in the original act of incorporation that it would have had if contained in an amendatory Act. The charter of most railroads is made up of a number of different Acts passed at different times. The power to lease in the Act of 1852 is no more or less *permissive* than the power to lease in the 16th section of the Augusta & Savannah charter. If the Act of 1852 was subject to repeal by the legislature, so was the 16th section of the Augusta & Savannah charter. But there never has been any legislation impairing either directly or indirectly the power to lease either under the Act of 1852 or under the 16th section of the Augusta & Savannah charter. While the Augusta & Savannah already had the power to lease itself, the Act of 1852 specially mentioned the

Augusta & Savannah in the same breath as the South Western, thus indicating that there was no distinction between the two in the legislative mind. Moreover there had been no change whatever in the legislative policy from 1838 to 1852 so far as the question of the taxation of railroads was concerned. The power to lease in the August & Savannah charter is not bound up with the tax provision in the sense that they are not separable. The tax covenant is in the 13th section of the charter and the lease power is in the 16th section of the charter.

We do not perceive how or why the Act of 1852 which authorized the South Western Railroad Company to lease its railroad to a specific railroad Company was, when it was acted upon in 1869, any the less effective or efficacious that the Act of the Augusta & Savannah Railroad which authorized it to make a lease indiscriminately to any railroad Company. The Augusta & Savannah Act was passed in 1838; its lease was not made until 1862, a lapse of 24 years; while in the case of the South Western there was only a lapse of 17 years between 1852, the date of the Act and 1869, the date of the lease.

So far as the irrepealable character of the contract is concerned the law was precisely the same in 1862, when the Augusta & Savannah lease was made to the Central as it was when the South Western lease was made to the Central in 1869.

Counsel for the Comptroller General, in his brief on the motion for rehearing, Point III, pages 6 and 7, suggests that in between the time the Charter of the Augusta & Savannah was granted in 1838 and the time when the South Western Railroad Charter was granted in 1845 that the legislature had undergone a change of heart on the subject of

granting tax exemptions to railroads, and he ventures the suggestion that none were granted after 1845, and he draws from this premise the conclusion that the grant of the power to lease in the Charter of the Augusta & Savannah had a different meaning from the grant of the power to the South Western to lease its road in the Act of 1852. The infirmity in the argument is that the premise is wrong. There were very many charters granted after 1845 which contained tax exemptions; there were many granted after 1852 which contained tax exemptions. Even as late as 1874 Charters were granted with tax exemptions. It was quite common to charter railroads and confer upon them the same powers, privileges, franchises and immunities as were possessed either by the Central Railroad & Banking Company of Georgia, or the Georgia Railroad & Banking Company. There is no special significance to be attached to the fact that the power to lease was omitted from the Charters of the South Western and the Muscogee Railroad Companies in 1845. The power to lease was omitted from the Charter of the Central Railroad & Banking Co. granted in 1833. The Georgia Railroad & Banking Company has the power to lease in substantially the same language as the Augusta & Savannah (Act 1833, § 12, p. 262). The State of Georgia pursued the same policy after 1845 as it did before in fostering these railroad enterprises, and there is nothing in the legislation of the State to the contrary. Not only did the State after 1845 grant numerous Charters with tax exemptions just as broad as the Augusta & Savannah Charter, but it pursued the policy of lending its credit to build railroads. A cursory glance at the Acts of 1870 will show that in nu-

merous instances the State incorporated railroads and loaned its credit to build them.

In order to refute the suggestion that the legislative policy had undergone a change by the time the Lease Act of 1852 was passed and to refute the believe expressed by Counsel for Defendant-in-Error that no tax exemptions were granted after 1845 we specify a few among many.

Acts 1847 p. 181—Macon and Western Railroad was incorporated and all the powers of the Monroe Railroad Company were conferred upon it. The Monroe Railroad Company had the power to farm out and lease its railroad conferred in the same language as the Augusta and Savannah Charter. It however had no irrepealable tax exemption (see 43 Ga., p. 643).

In 1856 the following railroads were incorporated with all the powers, privileges and immunities as were conferred upon the Central Railroad and Banking Co. of Georgia in (which had the provision as to taxation in substantially the same language as the Augusta and Savannah R. R.).

Georgia Air Line Railroad Co. (Act 1856, p. 165), Eatonton and Hog Mountain R. R. Co. (Act 1856, p. 173), Atlantic and Gulf R. R. Co. (Acts 1856, p. 158). (This company was also granted all the powers and immunities of the Georgia R. R. and Bkg. Co.)

In 1866 Augusta and Summerville Railroad Company was incorporated and its capital stock and earnings were exempted from all taxation by the State or the County of Richmond (Act 1866, p. 121).

In 1870 the following Railroads were incorporated with all the power, immunities, &c., of the Georgia Railroad and Bkg. Co.:

Augusta and Hartwell R. R. Co. (Acts 1870, p. 280), Brunswick and Augusta R. R. Co. (Acts 1870,

p. 299), Grand Trunk R. R. Co. (Acts 1870, p. 325), Americus and Hawkinsville R. R. Co. (Acts 1870, p. 332), (except Banking privileges).

In 1871 Rome and Raleigh R. R. Co. was incorporated with all powers and immunities of C. R. R. and Bkg. Co. of Ga. except Banking (Acts 1871, p. 176) and the Rome and Raleigh R. R. Co. was incorporated with all the powers and immunities of C. R. R. and Bkg. Co. of Ga. (Acts 1871, p. 198).

In 1872 the following railroads were incorporated with all the powers, privileges and immunities of the C. R. R. and Bkg. Co. of Ga. except the Banking privileges. Gainesville, Jefferson and Southern R. R. Co. (Acts 1872, p. 333), Griffin and Sandtown R. R. Co. (Acts 1872, p. 341), Sandersville Branch R. R. Co. (Acts 1872, p. 366).

VIII.

The case of Rochester Railway Co. vs. Rochester, 205 U. S. 236, and kindred cases are distinguishable from this case and have been so decided by this Court.

The case of *Rochester Railway Co.* vs. *Rochester* decides that where a *personal* tax exemption has been conferred on a corporation the exemption does not pass to an assignee or transferee by a conveyance of the rights, powers, privileges, immunities and franchises of the corporation upon which the tax exemption was conferred.

This court decided in the case of the attempt to tax the fee of the Georgia Railroad to the Lessee: "The particular features of the case in hand take

it without the rule applied in *Rochester Ry.* v. *Rochester,* 205 U. S. 236, and other kindred cases from which we have no purpose to depart."

Wright vs. *L. & N. Railroad Co.,* 236 U. S. 687, 690.

The case of *Morris Canal Co.* v. *Baird,* 239 U. S. 126, pointed out the distinction between *Rochester Ry. Co.* v. *Rochester* and the charters of these companies.

This Court in the decision of this case held that *Rochester Ry* v. *Rochester* did not apply to this case.

Central of Ga. Ry. Co. v. *Wright,* 248 U. S. 526.

IX.

Jetton v. University of South, 208 U. S. 489, is distinguishable from this case and so is Morris Canal Co. v. Baird, 239 U. S. 126.

We pointed out the distinction between the case of the University of the South and our case in our original brief, page 29. In that case there was a total immunity from taxation. In our case there is not a total immunity from taxation; our charter prescribes a maximum rate of taxation for a particular line of railway. In the University of the South case the contract was "that said University may *hold and possess* as much land, etc., not to exceed 10,000 acres, one thousand of which, including buildings and other effects and property of said corporation shall be exempt from taxation as

long as said lands belong to said University". There was no special power to lease as there is in our case.

In the decision of this case the case of the University of the South was distinguished from this case.

Central of Georgia Ry. Co. v. *Wright*, 248 U. S. 525.

In the case of the Morris Canal Co. the tax exemption was personal to the Canal Co. and was expressly limited to such property "as is possessed, occupied and used by the said company for the actual and necessary purposes of said canal navigation". And the Court noticed the distinction between that charter and the charters involved in this case.

We are not concerned with the question whether if the South Western should sell or otherwise transfer its railroad, the charter limitation would be lost. We are only concerned with the case actually before us. The legislature contracted that this particular railway should be taxed not higher than at a particular rate on its net income. It was not a mere personal exemption; it was annexed to the property. The power was given to lease the railway to a particular Railroad Company. The measure of the tax under the charter is the net income from the operation of the railway, not the rental which the lessor might arbitrarily fix. By authorizing the lease to a particular railroad the legislature clearly indicated that the income might be made by the operations of either the lessor or the lessee. When the net income is taxed as it has been at the highest rate permitted by the charter, that piece of railway has been exhaustively taxed, and it cannot be taxed any further, by the expedient of taxing an interest in it to another person. When

the fee is taxed the whole property and every interest in it is taxed. The Supreme Court of Georgia said so in terms, "The leasehold interest in the railroad so returned was taxed in taxing the entire fee".

Wright v. *Central of Ga. Ry. Co.*, 146 Ga. 406, 414.

The above observation was made by the Supreme Court of Georgia with reference to those portions of the South Western which are taxable on the *ad valorem* basis, as a reason why the leasehold interest in those portions of the road were not taxable. So we say here, when we have paid the income tax at the highest rate permitted by the charter the fee of the property is taxed and the power of the state is exhausted. This court has said in the case where the fee was sought to be taxed:

"We are not suggesting that the contract in the charters of the lessors passed by assignment to the lessee, nor are we implying that the property was exempted generally into whosoever hands it might come. We are dealing only with the specific transaction permitted and encouraged by the Acts of 1838 and 1852, and saying that we cannot reconcile it with our construction of those Acts to allow that transaction to change the position for the worse. We construe those statutes as making the fee exempt from other taxation than that provided for, in favor as well of the lessee as of the lessor—the protection of the lessee being necessary in order to make good that promised to the lessor.

Wright v. *Central of Georgia Railway Co.*, 236 U. S. 674, 680.

Comptroller General in his brief, page 6, speaking of the former case in which he attempted to tax

the fee, says: "the taxability of that interest (referring to the leasehold interest) had been intimated by the District Judge, was all but conceeded in the argument before this Court, and was believed to be intimated by this Court in the careful limitation of the judgment to the non-taxability of the fee." The decision of the District Judge in that case is *Central of Georgia Ry Co.* v. *Wright,* 206 Fed. 107. The District Judge merely said that by his decision he expressed no opinion on the subject of the taxability of the leasehold; and the Supreme Court of the United States said substantially the same thing in its decision. There was absolutely no concession in the argument on the subject. Counsel for the Comptroller was urging upon the Court the case of *Jetton* vs. *University of the South,* and we replied that the case then before the Court was an attempt to tax the fee and the Jetton case related to taxation of a leasehold.

X.

The power to lease the Muscogee Railroad is clear.

Counsel for the Comptroller General contends in his brief on the motion for rehearing, page 9, that "No permission to lease the Muscogee Railroad was ever given by the State at all." This is the first time this contention has ever appeared in the case. In our petition, paragraph 8, Record, page 8, we set up the Act of 1852 as authority to the South Western Railroad Company to make the lease of 1869.

The Muscogee Railroad was then owned by the South Western Railroad Company. The defendant admitted paragraph 8 of the petition (see Record, pp. 58 and 59).

The charter of the Muscogee Railroad Co. covered the line from Butler to Columbus, 50.85 miles (Record, p. 12).

The Muscogee Railroad Company was consolidated into the South Western Railroad Co. under the Act of March 4th, 1856 (Acts, 1856; p. 187). The consolidation took place in November, 1868, because the stockholders did not ratify it until then, as they were required to do by the Consolidation Act. The lease was made in 1869, so that the Muscogee Railroad was part and parcel of the South Western Railroad Company then. The Consolidation Act provides "it shall be lawful so to unite and consolidate the said two companies into one, under the charter of the South Western Railroad Company". Then provision is made for the exchange of stock of the Muscogee Railroad Co. for the stock of the South Western Railroad Co. And finally it is provided: "And thenceforward all the rights, privileges and property of the said Muscogee Railroad Company shall be part and parcel of the said South Western Railroad Company and *all the chartered rights and privileges of the South Western Railroad Company be extended over the track and line of the Muscogee Railroad Company* and everything appertaining thereto; the name and style of the Consolidated Company shall be and continue 'the South Western Railroad Company'."

This seems to make it pretty clear that the South Western Co. had the right to lease the Muscogee line in 1869 under the power conferred by the Act

of 1852. The Act of 1852 applied to lines which "now connect or may hereafter connect". Moreover the Muscogee line connected with the Central railroad and therefore for this additional reason the Act of 1852 conferred the power to lease. The Muscogee line was merely an extension of the South Western line from Butler to Columbus, a distance of about 50 miles.

Respectfully Submitted,

A. R. LAWTON,
T. M. CUNNINGHAM, JR.,
For Central of Georgia Railway Company.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 30.

CENTRAL OF GEORGIA RAILWAY COMPANY,
PLAINTIFF-IN-ERROR,

vs.

WILLIAM A. WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA, DEFENDANT-IN-ERROR.

ON REHEARING.

MEMORANDUM OF CHARTER AMENDMENTS CITED IN ARGUMENT FOR PLAINTIFF-IN-ERROR AND NOT APPEARING ON THE BRIEF.

These statutes were cited in connection with the act of January 22, 1852, permitting the Central to lease the Southwestern and other connecting railroads.

Georgia Laws 1851-2, 119.

1. On the same day was passed an act so amending the charter of the Southwestern as to permit it to build from Fort

Valley to Wolf Pen (afterwards Butler, where it connected with the Muscogee), making the new line part and parcel of the Southwestern and providing that all rights and privileges granted to the Southwestern should extend over the new road.

Georgia Laws 1851-2, 121.

2. An act of March 4, 1856, consolidating the Muscogee and Southwestern Railroads.

Georgia Laws 1855-6, 187.

3. An act of December 21, 1857, authorizing the Muscogee to connect with the Mobile and Girard.

Georgia Laws 1857, 73.

4. An act of December 13, 1859, authorizing the consolidation of two small railroads with the Central, and authorizing the latter to increase its stock.

Georgia Laws 1859, 316.

5. An act of December 19, 1859, (1) amending the charter of the Southwestern by authorizing an increase of capital stock, (2) incorporating the Enterprise Railroad Co., but making it subject to taxation at the discretion of the legislature, and (3) amending the charter of the Macon and Warrenton Railroad, as to which unimpaired power of taxation was expressly reserved.

Georgia Laws 1859, 329.

It was under this act that the Southwestern acquired its line from Americus to Albany, which by section 2 was made to pay "the same tax that the rest of the Southwestern Railroad Company is liable to pay and *such additional tax as the legislature may hereafter impose.*"

6. An act of December 18, 1860, authorizing the Southwestern to construct a branch and to increase its capital stock, with the proviso that this *additional* capital stock should be subject to "such additional tax as the legislature may hereafter impose."

Georgia Laws 1860, 197.

7. An act of December 11, 1861, authorizing the Atlantic & Gulf to build to Tybee Island, and authorizing the Central to transport freight and passengers on the new line.

Georgia Laws 1861, 113.

8. An act of December 17, 1861, authorizing the Central to connect with the Atlantic & Gulf by a track through the city of Savannah.

Georgia Laws 1861, 114.

9. An act of December 11, 1862, authorizing the Southwestern to increase the number of its directors.

Georgia Laws 1862, 87.

10. An act of March 2, 1865, amending the charter of the Central to provide for a change of principal office, a change in the number of directors, etc., during enemy occupation of the territory.

Georgia Laws 1864-5, 46.

11. An act of November 26, 1866, changing the voting power of the stock of Central.

Georgia Laws 1866, 123.

12. An act of December 13, 1866, authorizing the Central to make a change in its line and shorten distance.

Georgia Laws 1866, 123.

13. An act of September 23, 1870, renewing for thirty years the banking privileges of the Central.

Georgia Laws 1870, 86.

14. An act of October 26, 1870, authorizing the Central to make another change in its line.

Georgia Laws 1870, 310.

15. An act of August 20, 1873, authorizing the Central, the Southwestern (then under lease to the Central), and the Macon and Western (shortly thereafter leased to and later consolidated with the Central), to issue joint and several bonds and secure the same by mortgages on the three railroads. There was no power to mortgage under these three ancient charters.

Georgia Laws 1872, 331.

16. An act of August 24, 1872, authorizing the consolidation of the Macon and Western into the Central.

Georgia Laws 1872, 351.

17. An act of February 20, 1873, increasing the number of directors of the Central.

Georgia Laws 1873, 88.

JUDICIAL HISTORY OF THESE CHARTER TAX CONTRACTS.

Central R. R. *vs.* Macon (1871), 43 Ga., 605.
Central R. R. *vs.* State (1874), 54 Ga., 401.
Southwestern R. R. *vs.* State (1874), 54 Ga., 401.
Central R. R. *vs.* Georgia (1875), 92 U. S., 665.
Southwestern R. R. *vs.* Georgia (1875), 92 U. S., 676.
Wright *vs.* Southwestern R. R., 64 Ga., 783.
Southwestern R. R. *vs.* Wright (1886), 116 U. S., 231.
Central R. R. *vs.* Wright (1896), 164 U. S., 237.
Wright *vs.* Central R. R. (1915), 236 U. S., 674.
Central R. R. *vs.* Wright (1919), 248 U. S., 526.

Respectfully submitted,

ALEXANDER R. LAWTON,
T. M. CUNNINGHAM, JR.,
For Plaintiff-in-Error.

October 14, 1919.

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TABLE OF CASES.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 30.

CENTRAL OF GEORGIA RAILWAY COMPANY,

Plaintiff in Error

vs.

WILLIAM A. WRIGHT, Comptroller-General of the State of Georgia,

Defendant in Error.

In Error to the Supreme Court of Georgia, on Rehearing.

BRIEF FOR WILLIAM A. WRIGHT, Comptroller-General.

The rehearing is confined to the question whether the leasehold interest of the Central of Georgia Railway Company in the Southwestern Railroad and Muscogee Railroad is subject to general taxation, or by reason of the charters of the leased companies and subsequent legislation, it is exempt from such taxation.

The motion for rehearing and brief accompanying it are referred to as stating generally the contentions on this question. This brief will be an expansion of some of the points.

I.

HISTORICAL STATEMENT.

We may well begin with a statement in order of time of the legislative occurrences bearing on the question, with quotation of the material parts of the statutes and charters.

Railroad enterprise in Georgia began in 1831 when the Georgia Railroad Company was chartered. The name was changed to Georgia Railroad and Banking Company and its powers enlarged in 1833 and 1835. Prince's Digest of Georgia Laws, p. 304 and following.

The Augusta and Waynesboro Railroad, afterwards Augusta and Savannah Railroad, was incorporated in 1838, being the southeasterly continuation of the Georgia Railroad, its charter being modeled on that of the Georgia Railroad. Georgia Laws of 1838, p. 174.

Each of these companies, in connection with a limitation of taxation to one half of one per cent. on their net annual income, was given in its charter the right to "rent or farm out all or any part of their exclusive right of transportation. . . .for such term as may be agreed upon."

The Southwestern Railroad Company was chartered in 1845, Georgia Laws of 1845, page 132. A limitation as to the tax rate similar to that of the Georgia and the Augusta and Savannah Railroads was given it, but the charter is entirely silent as to any right either to sell, rent or lease either the franchises or the railroad. Neither lessees nor assigns are mentioned in the charter. The charter contract was with the corporators alone.

The Muscogee Railroad Company, also in southwest Georgia, was chartered by the same legislature. Georgia Laws of 1845, p. 116. Like the Southwestern Railroad Company, it was given a limit to taxation, but no right to rent, lease or sell franchise or road.

The Constitution of Georgia of 1798, which remained of force till 1861, did not fetter the Legislature at all in the matter of methods of taxation, or exemption from taxation. There does not appear to have been any law to tax a railroad at all till 1850, when was passed,

> "An Act supplementary to the general tax laws and to tax certain property therein mentioned which has heretofore been exempt from taxation."

Section 1. Imposed on the Georgia Railroad & Banking Company a tax of one half per cent. on the net annual income of the road and its branches (the charter limit), and Section 2 a tax of 31¼ cents per hundred dollars, (the prevailing property tax at the time) on its banking capital. By Section 3 a similar tax was put on the Central Railroad and Banking Company (its charter limit). Section 4 taxed the stock of the Macon and Western Railroad 31¼ cents per hundred dollars. Section 5 made the taxes annual until repealed. Georgia Laws of 1850, p. 378. By Section 6 of another Act the Memphis Branch Railroad was taxed 31¼ cents per hundred dollars on its stock. Georgia Laws of 1850, p. 377.

By an Act approved January 9, 1852, the tax laws were reduced to some system. Georgia Laws of 1851-2, p. 288. Section 1 provided:

> "All real and personal estate within this State, whether owned by individuals or corporations, resident or non-resident, shall be liable to taxation, subject to the exemptions herein specified."

This Section has been continuously of force since, and is now. Section 1002 of the Code of Georgia of 1911.

The exemptions set forth in Section 3 are practically those still of force, and do not include railroads.

By an Act of the same day, page 294, the general tax rate was made one twelfth of one per cent. and by an Act of January 22, 1852, page 295, that rate was applied to the two railroads which were taxable generally.

On this same day January 22, 1852, Georgia Laws of 1851-2, page 119, was approved,

> "An Act to authorize the Central Railroad and Banking Company of Georgia to lease and work such railroads as now connect or may hereafter connect with the Central Railroad and to authorize the Board of Directors of such railroad companies as now have or may hereafter have their respective railroads connecting with the said Central Railroad to make leases thereof for a term of years or during the continuance of their respective charters."

In the body of the Act are mentioned as the connecting railroads, the Augusta and Savannah and the Southwestern Railroads, but not the Muscogee Railroad. The last named lay at the opposite end of the Southwestern Railroad from the Central Railroad, and never did connect with the Central Railroad. This Act contained *no word* of reference to taxation generally, or to the "privileges" or "immunities" that should arise in respect of taxation upon such lease. It is bare authority to make the leases stated in the title of the Act.

By an Act of February, 1854, Georgia Laws of 1853-4, p. 109, Section 5, it was provided:

> "Upon the several Railroad Companies of this State now in operation or that may hereafter go into operation, whose charters do not exempt them from such taxation, there shall be levied and col-

lected in the manner now prescribed by law for the collection of taxes from corporations the same per centum tax upon the whole capital stock paid in as is levied upon stock in trade, etc."

And by Act of December 1858, Georgia Laws of 1858, p. 105, Section 13, it was enacted:

> "That the several Railroad Companies in this State that may be now or hereafter in operation, are hereby required to make their returns to and pay the State Treasurer in each year on or before the 31st of December, one half of one per cent. upon the net annual income of said railroads."

The Code, enacted in 1861, which was to take effect on January 1, 1863, contained sections putting the tax on railroads with that on banks, but these sections were stricken, and the provision of the Act of 1858 restored by Act 1861, page 81.

Meanwhile in 1856, Georgia Laws of 1856, p. 187, there was passed

> "An Act to authorize and provide for the union and consolidation of the Muscogee Railroad Company with the Southwestern Railroad Company, under the charter of the latter company."

This Act contains no reference to taxation or "immunities", and stated:

> "Section 5. This Act shall go into operation when and not until there shall be a vote of a majority of two thirds of the stockholders in amount of stock of each of said companies in favor of union and consolidation and of the provisions of this Act, certified under the corporate seals of said companies, respectively, to his Excellency, the Governor of this State."

The Constitution of Georgia of 1861 contained nothing of importance on the matter of taxation.

That of 1865, Article V, Section 5, declared of force as law in the State the Code which went into effect January 1, 1863, with subsequent statutes, except such portions as might be in conflict with the Constitution of the United States or of the State of Georgia. Code of Georgia of 1867, Section 4984.

The Constitution of Georgia of 1868, ArticleI, Section 27, declared:

> "Taxation on property shall be *ad valorem only*, and *uniform* on all species of property taxed."

Code of Georgia of 1873, Section 5019.

This Constitution became effective on July 25, 1868.

Foster vs. Daniels, 39 Ga., 39.

Strickland vs. Griffin, 70 Ga., 541.

Not until *November*, 1868, did the Muscogee and Southwestern Companies act upon the Act of 1856 and unite their companies:

Southwestern R. R. Co. vs. Georgia, 54 Ga. page 411, at center.

Not until *June* 1869, did the Southwestern Railroad Company and the Central Company act upon the Act of 1852 and make a lease of the former's railroad.

In 1874, legislative action was taken to tax all the railroads ad valorem, Georgia Laws of 1874, p. 107, and to repeal conflicting charters. This resulted in litigation with all the companies. No account was taken of the leases therein, but *the original owners* were sought to be taxed for the fee in the railroads. It was held by this court that the tax contracts of the Southwestern and Muscogee Railroads were unaffected by their union:

Southwestern Railroad Company vs. Wright, 92 U. S., 676.

The Constitution of 1877 contained very drastic tax provisions:

> "Article 4, Section 1. 'The right of taxation is a sovereign right, inalienable, indestructible, is
>
> the life of the State, and rightfully belongs to the people in all republican governments; and neither the General Assembly nor any nor all the departments of the government established by this Constitution shall ever have the authority to irrevocably give, grant, limit or restrain this right; and all laws, grants, contracts, and all other acts whatsoever by said government or any department thereof to effect any of these purposes shall be and are hereby declared to be null and void for every purpose whatever; and said right of taxation shall always be under the complete control of and revocable by the State, notwithstanding any gift, grant, or contract whatsoever by the General Assembly."
>
> "Article 7, Section 2, paragraph 5. "The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State shall be a party."
>
> Code of Georgia of 1911, Sections 6462, 6557.

Uniform ad valorem taxation was also continued thereby, with limited exemptions not including railroads. Article 7, Sec. 2.

> Code of Georgia of 1911, Section 6553.

By an Act of November 12, 1889, Georgia Code of 1911, Sec. 1008, it was enacted:

> "All persons owning any mineral or timber interests, or any other interest or claim in or to land less than the fee, shall return the same for taxa-

tion and pay taxes thereon the same as other property. Any person failing to comply with this requirement, shall be proceeded against as a defaulting tax-payer."

By an Act of the same year, Georgia Code of 1911, Sections 1036 and following, railroads were for the first time subjected to county taxation.

By an Act of 1890, Georgia Code of 1911, Section 872 and following, they were subjected to municipal taxation.

In 1892, a general law for the incorporation of railroads was passed, (Georgia Code of 1911, Section 2577 and following). It provided for the case of purchasers at foreclosure sale of former railroads, allowing them to re-incorporate, and allowing them to exercise and enjoy thereafter the same rights, grants, privileges, franchises and immunities and advantages in or by said trust deed conveyed, etc., but adding immediately:

> "Provided, that nothing in this article shall be construed *to reserve any exemption from taxation, either State, County or Municipal,* or any *special rights, privileges and immunities* that are not herein authorized to be granted to each and all railroads alike, in conformity to the *present Constitution of Georgia.*"

Georgia Code of 1911, Section 2585 (11)

The Central Railroad and Banking Company having failed, and its property, including the lease of the Southwestern Railroad, having been sold under foreclosure, the purchasers availed themselves of this law, and incorporated as the Central of Georgia Railway Company, October 17, 1895, the charter granted them and accepted by them stipulating as follows:

> "Therefore, the State of Georgia hereby grants unto the above named persons, their successors and assigns, the powers and privileges of a cor-

poration for the purposes above stated, with full authority by and under the name of the Central of Georgia Railway Company, to exercise the powers and privileges of a corporation for the purpose above stated, and to maintain and operate said railroad as prayed for, *subject to Article 4 of the Constitution* of this State and *all the laws governing railroad companies* at the date hereof or that may hereafter come of force, etc."

Printed Record, page 73.

Article 4 of the Constitution is that relating *to taxation* from which quotation was made above.

On October 17, 1895, the lease in controversy, covering both the Southwestern and Muscogee Railroads, was made between the Southwestern Railroad Company and this Central of Georgia Railway Company; its concluding agreement is that it shall be taken *in substitution for* the original lease of June 24, 1869, the provisions of which were to be "no longer operative or in existence except as *herein expressly provided.*

In 1914, the leasehold interest thus acquired by the Central of Georgia Railway Company was discovered to be *of value,* and under the Constitution and laws relating to railroads, that Company was called on to pay taxes on it. Its value has been ascertained by arbitration to be $1,046,809. There is no question here but that it is separately worth that upon the market, as vendible property.

II.

PLAINTIFF'S CHARTER.

When the Central of Georgia Railway Company was given by the State its corporate existence, and permitted to run these railroads at all, it was expressly "subject to Article 4 of the Constitution of the State." That Article established uniform ad valorem taxation of all property, and forbade special immunities and exemptions.

The laws in existence separately taxed all "interests less than the fee" to the owners.

This charter is as *much a contract* as any other, and the agreements in it in favor of the State are as much to be enforced and respected as those in favor of the corporation. Having thus *agreed* to pay taxes according to the Constitution and laws, and been *allowed existence* on that express condition, the corporation would be *estopped to assert* an exemption if it had acquired one. It would be waived.

The statute under which the charter was granted, being by an elementary principle, part of the charter, also in *express terms excepted*, "any exemption from taxation, either State, County of Municipal", doubly emphasizing the State's insistence that no corporation formed under it should exercise any such immunity.

> "The authorities are numerous and conclusive that no corporation can receive by transfer from another an exemption from taxation or governmental regulation which is inconsistent with its own charter or with the Constitution and laws then applicable; and this is true even though under legislative authority the exemption is transferred by words which clearly include it."
>
> "Those who seek and obtain the benefit of a charter of incorporation must take the benefit upon the conditions and with the burdens prescribed by the laws then in force, whether written *in the Constitution, in general laws,* or in the *charter itself.*"
>
> Rochester v. Rochester, 205 U. S., 254, 255, quoted approvingly in
>
> Great Northern Railroad v. Minnesota, 216 U. S., 229.

See the many authorities cited in the foregoing cases. While it is true that this lease had lost money to the for-

mer Central Company, and the Southwestern Railroad did not earn the rental in the receivers hands, the new Central Company had no reason to expect otherwise than that the interest it took under its new lease would be taxable under its charters and the laws, if such interest became separately valuable though the reversion and rent appurtenant belonging to the lessor was taxable to it in a limited manner only.

III.

LEASEHOLD OF 1869 TAXABLE.

While the Southwestern and Muscogee Railroads had contracts for limited taxation, measured by their incomes from the roads, these contracts were personal contracts, and did not run with the property or an interest in it, if conveyed to another, unless the State expressly so agreed, either originally in making the charters, or subsequently in authorizing the conveyance, and unless the State Constitution at the time permitted. We have shown that the leasehold arising under the lease of 1895 was taxable under the Constitution and laws then existing, and not only was there no contract *to exempt* the leasehold at the time, but the *contract with the lessee was that it should exercise no tax exemption.* We now urge that if the old lease of 1869 were still of force, and the present lessee not estopped, the leasehold would still be taxable. It is believed the whole law is accurately stated, on ample authority from this court and the State courts by Mr. Henry Campbell Black, in his article on taxation in Cyc:

> "Exemption from taxation granted by the legislature to an individual or corporation is not a franchise, nor is it an estate or interest inherent in or running with the particular property exempted; but it is a mere privilege personal to the grantee; and unless there is express statutory authority therefor, the exemption will not pass to a successor of the corporation, or a person taking

the property by sale, assignment, or other transfer. So in construing grants of exemption, they will be construed as personal and limited to the grantee, unless a contrary intention clearly appears. But the legislature may authorize a transfer of the exemption, either by the Act originally granting it, or by a subsequent statute, unless at the time of the later statute there is some constitutional prohibition against the granting of such an exemption."

37 Cyc. 897.

"Although the obligations of such a contract are protected by the Federal Constitution from impairment by the State, the contract itself is not property which can be transferred by the owner; being personal to him with whom it is made, it is incapable of assignment. The person with whom the contract is made by the State may continue to enjoy its benefits unmolested, but there his rights end. He can not by *any form of* conveyance transmit the contract or *its benefits* to a successor."

Rochester v. Rochester, 205 U. S., 247.

A lease is a form of conveyance to which the principle applies:

"This Act merely permitted the lease of the 'Canal of said company or any part thereof, with all or any part of its boats, property, works, appurtenances and franchises'; and as clearly pointed out in the Rochester case, an exemption from taxation does not pass under a valid lease or sale of corporate property, together with the appurtenances and franchise."

Morris Canal Co. v. Baird, 239 U. S. p. 133.

So in the case at bar, the Act of 1852 only permitted the old Central Company "to lease and work the railroads"

connecting with it, not even mentioning "franchises" or other word that could be contended to have a reference to a tax immunity. While th interest remaining in the lessor was still protected by the personal contract against taxation higher than one half per cent. on its net annual income, to wit, the reserved rental on the road; the interest acquired by the lessee remained under the general law, liable to be taxed as the property of the lessee. It is true that in 1869 there existed no law for the separate taxation of the leasehold interest in property, unless the provisions of the Constitution of 1868 and the Code in requiring *all property* to be taxed uniformly ad valorem, implied it. But that fact did not fetter the legislature, or prevent the passage of laws for its taxation. *No railroads were taxable under any law,* when these were built but we have seen that they were freely taxed subsequently in various ways, no contention ever being raised against the power, except where there was a contract preventing it; nor was there law for taxing railroads by counties or cities until 1890. The point was answered by this court as to taxation of a leasehold by subsequent statute, thus:

> "The fact that at the time when the exemption was granted to the owner of the fee the State had not provided for taxation of the lessee in his own name is not important. The different interests of an owner of the fee and the owner of an estate for years as a lessee existed, and such existence was recognized. An exemption of one did not necessarily include the other. The contract of exemption did not imply in the most remote degree that the State would not thereafter through its legislature so change its mode of assessment as to reach the interest of the lessee directly, and not through the owner of the fee. In so doing, the State does not tax the owner of the land in fee, nor the fee itself. It taxes what it has a right to tax, a separate and distinct interest in the land, although

the fee be in the university which can not be taxed therefor."

Jetton vs. University of the South, 208 U. S., page 500.

The Act permitting the lease was passed in 1852, but not acted on till June 1869. If this Act *had attempted to extend the exemption* to the lessee, it would be of importance to consider that in the meanwhile the Georgia Code of 1863 had gone into effect which made sweeping changes in the status of corporations. (See Atlantic and Gulf R. R. vs. Georgia, 98 U. S., 359), and the Constitution of 1868 had been adopted, making uniform ad valorem taxation the system of the State; and the question would have been whether the Act of 1852, which was a *mere* offer on the part of the State until acted on and so accepted by the corporation, should not be considered as modified by all the subsequent legislation affecting the subject of taxation. That there was no contract till acceptance in 1869, see

Southwestern R. R. vs. Georgia, 54 Ga., 402, Buffalo R. R. vs. Falconer, 103 U. S., 821.

And that all the *then* body of laws was part of the contract, see:

Great Northern R. R. vs. Minnesota, 216 U. S., 206 and cases cited.

But the whole question is removed by noting that the Act of 1852 *makes no attempt to extend any immunity to the lessee.*

And an immunity from taxing power never arises from silence or by implication, but only from *express terms* that admit of no other reasonable construction.

Yazoo vs. Adams, 180 U. S., 1, 22; Phoenix Insurance Co. v. Tennessee, 161 U. S. 174; Bank of Commerce v. Tennessee, 161 U. S., 134, 146; Southwestern Railroad v. Wright, 116 U. S. 231.

IV.

THE ORIGINAL CHARTERS DO NOT PROTECT THE LESSEE.

Extension of the immunity from taxing power to the lessee or vendee may arise from the original contract. This has been held to be the case with the charter of the Georgia Railroad and Banking Company, construed in Wright vs. Louisville and Nashville Railroad Company vs. Wright, 236 U. S. 687, and with that of Augusta and Savannah Railroad construed in the decision of this case heretofore. In each of these charters alongside the covenant that taxation should not be higher than one half of one percent. of the net annual income, was a stipulation that the railroad might be rented out, so that a lease and a lessee came in contemplation, as a means of making the income, and it was considered that the legislature was shown thereby not to have intended any taxation of the lease interest arising.

The original charters of the Southwestern and Muscogee Railroads contain no reference to a renting, lease, or other disposition of the railroads other than their operation by the corporations. There is nothing whatever to build into an agreement that the immunity from general power of taxation was other than personal. These charters fall within this great class that have been construed by this court in which there are no express words showing an extension of the immunity beyond the immediate grantee of it. That this was the *rule* and the two charters above alluded to were *the exceptions*, was fully recognized in the case of

Morris Canal Co. v. Baird, 239 U. S., 132.

"As in determining whether a contract of exemption from a governmental power was granted, so in determining whether its transfer to another was authorized or directed, every doubt is resolved in favor of the continuance of governmental power, and clear and unmistakable evidence of the intent to part with it is required . . . The results in Wright vs. Central of Georgia R. R. Co., 236 U. S., 674, and Wright vs. L. & N. R. R. Co., 236 U. S., 687, were based upon the original charters which were interpreted as contemplating and permitting subsequent transfers without subjecting the fee to taxation. Neither of these cases modifies the principles announced and applied in the cases quoted from above."

It cannot be said that either the Southwestern or Muscogee charter either "contemplated" or "permitted" any extension of the tax contract to another, for no such thing is mentioned in either.

V.

TAX IMMUNITIES RUNNING WITH THE LAND.

When land is granted by the State with a tax provision as part of the tenure, the immunity runs with the land. This was settled so early as

New Jersey vs. Wilson, 7 Cranch, 164.

The principle was applied in

Stearns vs. Minnesota. 179 U. S., 223.

But that it applied only to lands so granted, and not to the personal contract embodied in a corporate charter as to the general property of the corporation, was clearly pointed out, and the Stearns case confined to the land granted by the State, in

Great Northern Railroad Co. v. Minnesota, 216 U. S., at pages 232, 233.

VI.

COMMUTED TAX AND NOT COMPLETE EXEMPTION NOT IMPORTANT.

It has been urged that we have here a commuted tax on the property, and not an entire exemption from taxation, and that that makes a difference.

In the first place, the statement is not accurate. These charters *impose* no tax whatever on the railroads. There is no affirmative agreement to pay anything. There is simply a limit measured in dollars by a per cent. of the income received by the corporation. Had the legislature taxed railroads specifically, so much a piece, the limit would have held good. So it holds good when an ad valorem tax is applied. It is not *a tax on income,* but a *limit based on income beyond which no sort* of taxation shall go, that is provided in its charters. This is shown by the fact that no tax was levied or paid till 1850 when laws were first passed to tax railroads.

In the next place, if it were a commuted tax, this court has always applied the same principles as apply to complete exemption, whether the question was of the original existence of a contract, or its extension to another. A very clear statement that the gist of both lies in the attempt to *limit governmental power by a contract,* is made by then Justice White in

Stearns vs. Minnesota, 179 U. S., at page 255.

An income tax was involved in that case. So in the Great Northern case an income tax of 3 per cent was involved. This identical charter of the Southwestern Railroad, with its own peculiar tax provision, was treated as subject to the rules by which tax exemptions are to be tested in

Southwestern R. R. vs. Wright, 116 U. S., 231.

VII.

EXEMPTION OF LESSEE WOULD INCREASE RENTAL.

The right to lease was not an original right of the Southwestern and Muscogee Companies. It seems never to have been given the Muscogee Company, since it was not named in the Act of 1852, or described thereon. No extension of the exemption of the lessor to the lessee as to his interest acquired by the lease is to be implied from the mere permission to lease. It would be equally as potent an argument to say that the right *of sale* would be much more valuable if the exemption could be sold too. As to exempt lands, which were capable of use by the University *only by leasing them,* it was said:

> "If the University could lease its lands, and also effectually provide that the interest of the lessee should be exempt from taxation, it may readily be seen that the amount of rental would be larger than if no such exemption could be maintained, but that is a matter wholly immaterial upon the question of impairment of the contract really made. That contract can not be extended simply because so construed it would add value to the exemption. The language used does not include the exemption claimed"—that is, of the interest of the lessee.
>
> Jetton v. University of the South, 208 U. S., 501.

VIII.

NO DOUBLE TAXATION RESULTS.

Taxing the lessee separately on his interest can not possibly result in double taxation. The value of the leasehold and the reversion must always equal the value of the fee. The lessee pays ad valorem on his interest measured by the value of his lease. If the value of the property subject to the lease, that is, of the reversion

with the rent appurtenant, produces a tax liability less than the limit of one half of one per cent. of the rental, then only the proper ad valorem tax will be collectible. If it exceeds that limit—as it does many, many times—the lessor is protected according to his contract. The lessee has lost nothing. No one has been taxed twice. The limit has simply *been confined* to the tax owed by the lessor, and such was the contract under the law.

If the property is really rented for its full earning power, the leasehold is worth nothing, for its profits are absorbed in rent. Such was the case with this lease at first. But if the earnings, by improvements, or otherwise, greatly and continuously exceed the rental, the lease being for a long term, the leasehold becomes very valuable. The lessee and not the lessor is getting the benefit of the increased earning. If the lease is sold, he gets the money for it. Why should he not pay the tax on it?

IX.

CONFUSION OF EARNINGS WAIVES EXEMPTION

By their voluntary acts, the Southwestern Railroad Company, the Muscogee Railroad Company, and the Central of Georgia Railway Company have confused completely in their operation a number of roads, some exempt from general taxation and others not. They constitute now one system continuously operated. In the former argument, in response to a question by Mr. Justice Brandeis, counsel for the Central of Georgia Railway Company, admitted that it was really impossible to ascertain accurately the net annual income of each particular road, and that a "car-mileage basis" would have to be used to estimate it. If the net annual income which limits the tax is not to be applied to the rental going to

the lessor, as we contend, but is to be extended for the protection of lessor and lessee to the net annual profit of operation, then it is impossible to ascertain the limit, and the contract therefor has been waived, for the State is not bound to accept estimates:

> "It would have been impossible to show what would have been the profits of each road without the consolidation. Only an approximation to them would have been attainable, and that would have been based on estimates more or less speculative in their character. The consolidation of the original companies was a voluntary proceeding on their part. The law made it dependent upon their agreement, and that law was passed presumably at their request, as they are named in it and acted under it. Having thus disabled themselves from complying with the conditions upon the performance of which the amount to be paid to the State as tax could be ascertained, they must be considered as having waived the exemption dependent upon such performance."
>
> Maine Central R. R. vs. Maine, 96 U. S., 499.

That the lessee has a separate interest under this lease, and that it is separately taxable under the law of Georgia, is a question of State law settled by the decision of the Supreme Court of Georgia. That the taxation thereof violates no agreement of the State, either in the original charters involved, or in the statutes permitting lease and consolidation, but that rather the refusal to pay taxes on the part of this lessee is a violation of its own charter contract, we trust is demonstrated to the satisfaction of the court. The affirmance of the judgment of the court below as to the leasehold interest in the Southwestern and Muscogee Railroads is respectfully urged.

We attach as an exhibit hereto the full text of the Act of 1845, incorporating the Southwestern Railroad Com-

pany; the full text of the Act incorporating the Muscogee Railroad Company; and the full text of the Act of 1852 hereinbefore referred to.

Respectfully submitted,

WARREN GRICE,

For WILLIAM A. WRIGHT, Comptroller-General of the State of Georgia.

"AN ACT to incorporate the Southwestern Railroad Company, with power to extend branches to Albany, in the County of Baker, and Fort Gaines in the County of Early, or to points below those places on the Flint and Chattahoochee rivers, and to punish those who may wilfully injure the same, and to incorporate the Columbus and Southeastern Railroad Company.

"Section 1. Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is hereby enacted by the authority of the same, That for the purpose of constructing a Railroad communication between the City of Macon and the navigable waters flowing into the Gulf of Mexico, J. Cowles, E. Alexander, Charles Day, James Dean, Thaddeus G. Holt, W. B. Parker, A. R. McLaughlin, Charles Cotton, James Rae, Erastus Graves, J. L. Jones, Charles Campbell, Edwin Graves, E. A. Nisbit, H. G. Lamar, J. D. Carhart, J. B. Ross, T. A. Brown, R. H. Randolph, N. C. Monroe, and such other corporation and individuals as may be associated with them, and their assigns, shall hereafter be a body corporate by the name and style of 'The Southwestern Railroad Company,' and by said corporate name shall be capable in law to buy, hold, and sell so much real and personal estate as may be necessary for said purposes, make contracts, sue and be sued, make by-laws, and do all lawful acts properly incident to a corporation, or necessary and proper for the transaction of the business for which it is incorporated, and to have

and use a common seal, and the same to alter and destroy at its pleasure.

"Sec. 2. Be it further enacted by the authority aforesaid, That the capital stock of said Company shall be two millions of dollars, divided into shares of one hundred dollars each, but may be increased to a sum not exceeding three millions of dollars, whenever it may be deemed expedient by a majority of the Board of Directors of said corporation for the time being.

"Sec. 3. And be it further enacted by the authority aforesaid, That the Company herein incorporated shall confine their efforts and enterprises to the building and completion of a railroad communication from the City of Macon to some point intermediate between Albany and Fort Gaines, or to any point or points upon the Flint and Chattahoochee rivers, below Albany and Fort Gaines, to be agreed upon by the Company, from which point the Company may construct Branch Railroads to Albany and Fort Gaines; said road and its branches being of such width and dimensions as may be deemed expedient by the directors of the Company, or their agents, the Company paying to owners of land through which the said road or its branches may pass, a just indemnity for the land covered by the railway, in manner as is hereinafter provided, and for three hundred feet on each side of the same, for the procurement therefrom of timber, earth, stones and other materials; and whenever a person shall own land on both sides of said railway, at any point, the Company shall be bound to suffer such owner to construct for his own convenience, such road or bridge across the railroad as may not obstruct, hinder or incommode its use and passage.

"Sec. 4. And be it further enacted by the authority aforesaid, That when the Company cannot agree with any person over whose land the Railroad may pass, as to the amount of compensation to be paid by the Company, or

the amount of damage sustained by the owner, the amount of such damage or injury shall be ascertained and determined by the written award of three sworn appraisers, to be chosen, one by the Company, one by the owner of the land, if he thinks proper, and one by the Inferior Court of the county in which the land lies; but if such owner shall decline to appoint an appraiser, then two appraisers to be appointed by the Inferior Court as aforesaid, and one by the said Company, the award of whom shall operate as a judgment for the amount against the Company, and shall be enforced by an execution from the Inferior Court, with the right of appeal to either party, to be tried by a special jury, at the next term thereafter of the Superior Court of said county, and the decision shall vest in said Company, the fee simple of the land in question, and in the other party a judgment for its value thus ascertained, which may be enforced by the ordinary process of said Court.

"Sec. 5. And be it further enacted by the authority aforesaid, That books of subscription to the stock of said Company shall be opened on the first day of March, eighteen hundred and forty-six, at the following places, under the superintendence of the Commissioners named, to remain open two days, viz.: At Macon, under the superintendence of Elam Alexander, T. G. Holt, James Dean, Briggs H. Moultrie, Charles Day and J. Cowles; at Perry, Houston County, under the superintendence of James Everett and William Felton; at Traveler's Rest, Dooly County, under the superintendence of John Young and Abel Holton; at Lanier, Macon County, under the superintendence of John Bryan and John C. Helvingston; at Americus, Sumter County, under the superintendence of James K. Daniel and William Dennard; at Starksville, Lee County, under the superintendence of Joseph Bond and Leonidas Mercer; at Albany, Baker County, under the superintendence of George B. King and Phineas M.

Nightingale; at Cuthbert, Randolph County, under the superintendence of Barzillia Graves and William A. Tennille; at Fort Gaines, Early County, under the superintendence of Joel Crawford and Samuel Gainer. The different sets of Commissioners above appointed, shall advertise the time, place, and terms of subscription in the public gazette or gazettes of the places respectively, and in the event no paper be published in the place, then in the public gazettes of Albany and Macon, and such advertisement shall be inserted at least four weeks before the day when the books are to be opened. Upon the books being opened as aforesaid, the Commissioners, or a majority of them, shall receive from individuals, corporations or companies, subscriptions for any number of shares they may see fit to subscribe for, on condition that at the time of the subscribing, there shall be paid down to the Commissioners, or a majority of them, five dollars on each share subscribed for which the Commissioners shall give a receipt, and forthwith remit the same to the Commissioners at Macon, to be by them deposited for safe keeping in the Commercial Bank at Macon, subject to the draft or order of said Company, by its President or Board of Directors, after the Company shall be organized; and the various Commissioners shall also forward to the Commissioners at Macon a list of the subscriber, with the amount paid, and the number of shares subscribed for set opposite each name; and in the event any portion of said stock remains unsubscribed for after the closing of the books on the expiration of the two days, then the Commissioners at Macon shall be empowered and authorized to procure the balance of the stock so remaining unsubscribed for, to be taken up in such time and manner as to them may seem fit; and so soon as one-fourth thereof is taken, they shall call a meeting of the stockholders at Macon, to organize the Company, in manner herein afterwards pointed out.

"Sec. 6. And be it further enacted by the authority aforesaid, That for the organization of the Company, the Commissioners at Macon shall appoint a suitable time and place for the meeting of the stockholders, which shall be advertised in the gazettes of Macon and Albany, for three weeks immediately preceding the day, at which time and place the stockholders may attend in person, or be represented and vote by proxy, and the stockholders being thus assembled, shall proceed, under the supervision of the Commissioners at Macon, to elect by ballot a President and five Directors, to serve for one year.

"Sec. 7. And be it further enacted by the authority aforesaid, That in said election for President and Directors, the votes shall be taken by the following rule: Each stockholder shall be entitled to a number of votes equal to the number of shares he may hold in the stock of said Company; and on all future elections for President and Directors, in the making, altering or repealing of by-laws, and on determining on measures involving the general interest of the Company, at any stated or occasional corporate meeting, the votes shall be governed by the above rule.

"Sec. 8. And be it further enacted by the authority aforesaid, That the election of President and Directors shall be made annually, according to a by-law to be made for that purpose, and in case any vacancy occur in the Board between two periods of general election, the remaining members of the Board shall fill such vacancy from the stockholders, by the selection of a suitable person to serve until the next regular election. And if it should so happen that the day of annual election of President and Directors should pass without an election being effected, or any day for such election, the corporation shall not thereby be dissolved or deemed to be discontinued, but it shall be lawful on any other day to hold and make such election, in such manner as may be pre-

scribed by the by-laws of the corporation, subject always to the rule prescribed in the seventh section of this Act.

"Sec. 9. And be it further enacted by the authority aforesaid, That a majority of the Directors shall constitute a Board for the transaction of business, of whom the President shall be one, save in a case of sickness or necessary absence, in which case his place may be supplied by any Director appointed by the President. The Board of Directors may call for instalments on each share, in such amounts and at such times as they may deem necessary for the interest of the Company, not to exceed one hundred dollars on each share in the whole, giving at least sixty days notice in the public gazettes of Macon and Albany, of such call, and any and all stockholders failing to pay any instalment so called for, within thirty days after the time designated in such call, shall forever forfeit his stock in said Company, and all payments which he may have made thereon, and the stock so forfeited shall vest in and become the property of said Company, to be disposed of as the Board of Directors thereof shall determine.

"Sec. 10. And be it further enacted by the authority aforesaid, That certificates of stock shall be issued to the stockholders, on the payment of the sum required at the time of subscription, which shall be transferable on the books of the Company only, and by personal entry of the stockholder, or his legal attorney or representative, duly authorized for that purpose.

"Sec. 11. And be it further enacted by the authority aforesaid, That the Board of Directors for the time being, shall have power to employ engineers, conductors, artists, managers, laborers, and to appoint any and all officers that may be necessary for transacting the business of the Company, fixing the salary or amount of compensation each and all of such officers and agents shall

receive; and the Board of Directors shall have power to fix the rate of toll upon all produce, goods, wares, merchandise and other effects, transported on the Railroad, and also the rate of toll to be charged for each and every passenger passing or traveling thereon, with power to collect the same, and shall be capable of exercising all such other powers and authorities for the well governing and ordering the affairs of said Company, as to them shall seem fit for the interests of said Company.

"Sec. 12. And be it further enacted by the authority aforesaid, That the Directors shall keep fair and regular entries of their proceedings in a book to be provided for that purpose; and on every question, when any one Director may require it, the yeas and nays of the Directors voting shall be duly entered on the minutes, shall at all times be produced to the stockholders, on demand, when at a meeting thereof they shall be required.

"Sec. 13. And be it further enacted by the authority aforesaid, That whenever the said Railroad shall intersect any public road, the Company shall be bound to build a safe and substantial bridge, to be afterwards maintained and kept up by the Company; and any public or private bridges may at any time be built across the Railroad. Provided, such bridges do not at all obstruct or incommode its use.

"Sec. 14. And be it further enacted by the authority aforesaid, That the said railway and its appurtenances, and all property therewith connected, shall not be subject to be taxed higher than one-half of one per cent. upon its annual net income.

"Sec. 15. And be it further enacted by the authority aforesaid, That if any person shall wilfully and maliciously destroy, or in any manner damage, injure or obstruct, or shall wilfully cause, or aid and assist, or council or advise any other person or persons to destroy, or in any manner damage, injure or obstruct said Railroad,

or any part thereof, or any bridge, vehicle, edifice, right or privilege granted by this act, and constructed for use under authority hereof, such person so offending shall be liable to be indicted, and on conviction thereof shall be imprisoned, at hard labor, in the Penitentiary, for a term not less than four years, in the discretion of the Court, paying all the expenses of the prosecution, and shall also be liable to a suit for damages, on the civil side of any Court having jurisdiction, at the instance of the Company, or any other person aggrieved.

"Sec. 16. And be it further enacted by the authority aforesaid, That after the route of said railway shall have been actually surveyed, located and adopted, and a plat thereof deposited in the Department of State, it shall not be lawful for any other Railroad to be built, cut or constructed in any way or manner, or by any authority whatsoever, running laterally within thirty miles of the route so adopted, unless by the said Company, or with the consent of the Board of Directors thereof, for the time being. Provided, this act shall not be so construed as to prevent the construction of a Railroad from the City of Columbus, as is hereinafter provided for by this act.

"Sec. 17. And be it further enacted by the authority aforesaid, That any number of stockholders who together shall be proprietors of five thousand shares, shall have the power, at any time, of calling a meeting of the stockholders for purposes, or the transaction of any business, or for action of the stockholders touching any matter or thing appertaining to the interests of the Company—giving sixty days notice of such meeting in the public gazettes of Macon and Albany, specifying in their call the objects of the meeting or the subject matter to be considered by the stockholders.

"Sec 18. And be it further enacted by the authority aforesaid, That the principal office of the Company shall

be located at Macon, with subordinate offices or agencies at Albany, and such other places as the Board of Directors may deem necessary and proper; and all elections and meetings of the stockholders shall be held at the principal office only.

"Sec. 19. And be it further enacted by the authority aforesaid, That the said Company shall have full power and authority to carry such Railroad over all and any rivers, creeks, or water courses, or waters that may be in the route thereof, or of either branch railroad, by suitable bridges or other proper means. Provided, that when such railway shall cross any navigable water course, that the same shall not be so constructed as to impede or in any way obstruct the navigation thereof.

"Sec. 20. And be it further enacted by the authority aforesaid, That the exclusive right granted by this act to the Southwestern Railroad Company, to construct, keep up and use a Railroad from Macon to the Flint and Chattahoochee, shall be and continue for the term of fifty years. Provided, nevertheless, that the said Company shall, after the lapse of said term of fifty years, be and remain incorporated and vested, as to their own work, with all the estate, rights, powers and privileges by this act granted and secured, except the exclusive right aforesaid, but the Legislature may renew and extend that exclusive right, upon such terms as may be prescribed by law and be accepted by said incorporated Company.

"Sec. 21. And be it further enacted, That whenever the Mayor and Council of the City of Columbus shall deem it expedient to construct a Railroad from the City of Columbus to connect with the Road herein authorized, they, or a majority of them, shall have power and authority to create a capital stock, not exceeding one million of dollars, to be divided into shares of the value each not exceeding one hundred dollars, to be subscribed for and

transferred under such terms, conditions and restrictions as may be prescribed by said City Council.

"Sec. 22. And be it further enacted, That said Company, when created, shall be known by the name and style of the 'Columbus and South-Eastern Railroad Company of Georgia,' and by and under such name shall have the right to build and construct a Railroad from the said City of Columbus, connecting with, or terminating at or near the Road therein authorized, at such point or place as may be determined upon by the stockholders of the said Columbus and South-Eastern Railroad Company of Georgia; and shall be authorized to have and exercise all the powers, privileges, rights and immunities, and be subject to all the limitations and restrictions, in the building and constructing said Road, as are herein prescribed for the South-Western Railroad Company.

"Approved, December 27, 1845."

"AN ACT to incorporate the Muscogee Railroad Company, and to punish persons for violating the provisions of the same.

"Section 1. Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is hereby enacted by the authority of the same, That for the purpose of constructing a Railroad from the City of Columbus to West Point, at or near the Monroe Railroad from Macon to the terminus of the Western and Atlantic Railroad in DeKalb County, to be selected and determined upon by the Directors hereinafter authorized to be elected, that John G. Winter, John Banks, A. H. Flewellen, James M. Chambers, Samuel A. Bailey, John H. Howard, T. B. Howard, James R. Jones, William A. Redd, H. S. Smith, Daniel McDougald, Hines Holt, Grigsby E. Thomas, James H. Shorter and P. T. Schley, and their associates, successors and assigns, be and they are hereby created a corporate body politic by

the name and style of 'The Muscogee Railroad Company,' with vested rights and privileges, and by said corporate name and style, shall be capable in law to purchase, accept, hold, and sell and convey real and personal estate, make contracts, sue and be sued, to make by-laws, appoint all necessary officers and prescribe their duty, and to do all lawful acts properly incident and connected with the objects of the said corporation, and necessary for the government and transaction of its business, to construct a Railroad from the City of Columbus to such point at or near the Monroe Railroad, from the City of Macon to the terminus of the Western and Atlantic Railroad in DeKalb County, and to make and use a common seal, and the same to alter and destroy at their pleasure. Provided, that their by-laws be not repugnant to the Constitution and laws of the United States or of this State.

"Sec. 2. And be it further enacted, That the capital stock of said Company shall not exceed two millions of dollars, to be divided into shares of not exceeding one hundred dollars each, and the Board of Directors shall prescribe the mode and conditions of the subscriptions for the stock in said Company, and issue certificates for the same.

"Sec. 3. And be it further enacted, That for the organization of the said Company, the said persons herein before named, or a majority of the same, shall appoint the times and places at which subscriptions for stock in said Company may be made, and shall immediately thereafter appoint a convenient time and place for the meeting of the subscribers for stock, in the City of Columbus, of which they shall give notice in one or more of the public gazettes published in said city, at which time and place they shall proceed to the election of seven Directors, who shall form and constitute the first Board of Directors, one of which said Directors shall elect as Pres-

ident thereof; and said President and Directors shall hold their offices for one year, and shall prescribe in their by-laws the manner of holding the subsequent annual elections for Directors; and in all cases the stockholders shall be allowed to vote in person or by proxy under power of attorney duly executed. The number of votes to which each stockholder shall be entitled, shall be according to the number of shares he, she or they may hold in his, her or their own right, or as trustee for three months prior to the election, one vote for each share. The said Board of Directors shall have power to fill all vacancies which may occur in their Board or other offices, until the regular annual election by the stockholders, and shall fix the compensation of the President of said Board, and all other officers of the said corporation. Not less than three Directors shall constitute a Board for the transaction of business, of whom the President shall always be one, except in case of sickness or necessary absence, in which case his place may be supplied by any one of the Directors present, to be elected President pro tem, by a majority of the Board present.

"Set. 4. Be it further enacted, That the said Board of Directors shall have power to select and take, or receive as donation, such strips of land as they may deem necessary for the construction, convenience and protection of said Railroad, and in case of disagreement between the owner and owners, and the said Board of Directors, in regard to the damages or price of any such necessary strip or strips of land, it may and shall be lawful for said Board to appoint one disinterested freeholder as an appraiser, and the owner or owners of such land another disinterested freeholder, if he, she or they should think proper, and the Justices of the Inferior Court, or a majority of them, of the county in which such lands may lie, shall appoint another distinterestd freeholder; but if such owner or owners shall decline to appoint an appraiser on his,

her, or their part, then two shall be appointed by the Justices aforesaid, all of whom shall be sworn by a Justice of the Inferior Court or Justice of the Peace, to make and return to said Court a just, true and impartial valuation of the damages or value of such strip or strips of land thus required by said Company, and their award shall be in writing, and signed by at least a majority of the said appraisers, and accompanied by a plat and full description of the said land, which shall be taken and held as a judgment for the amount against the said Company and may be enforced by an execution from the said Inferior Court, and the said plat and description of said land, and said award, shall be recorded in the said county, in the same manner as deeds, and shall vest the fee simple right to the said strip or strips of land in the said corporation. Provided, that if either party shall be dissatisfied with the award of the appraisers, he, she, or they may appeal to the Superior Court of the county where the land lies and have the damages ascertained by the verdict of a special jury at the first term, and such verdict shall be conclusive and binding on both parties.

"Sec. 5. Be it further enacted, That the capital stock of the said Railroad Company shall not be taxed by the State higher than one-half of one per cent. upon its net income, nor shall any other tax be levied or collected on the stock of said Company.

"Sec. 6. Be it further encated, That the said Company shall build, and keep in good order, substantial bridges or ways of passage across said Railroad, wherever it may cross a public road, and if any person shall wilfully and maliciously destroy, or in any manner hurt, damage, injure or obstruct, or shall counsel, aid, assist, or advise any other person or persons, to hurt or otherwise injure and obstruct said Railroad, or any of the appurtenances or appendages thereunto belonging or appertaining, such person, so offending, shall be liable to be indicted for a misdemeanor, and on conviction thereof, shall be imprisoned at hard labor in the Penitentiary, at the discretion of the Court, for a term not less than four years, and shall further be liable to pay all expenses of repairing or rebuilding the same.

"Sec. 7. And be it further enacted, That the books, papers and correspondence, and the funds of said Company, shall at all times be subject to the inspection of the Board of Directors and the stockholders, at any and every meeting thereof, when required; and all bonds, notes, or other evidence of debt, or contract, or liability, or engagement on behalf of said Company shall be binding and obligatory on said corporation when the same shall be signed by the President of said Company and countersigned or attested by the Secretary thereof and the funds of said Company shall in no case be held responsible for any contract or engagement unless the same shall be so signed, countersigned or attested as aforesaid.

"Sec. 8. And be it further enacted by the authority aforesaid, That the stockholders in said Company shall be liable in proportion to the number of shares held by them respectively for the debts of said Company, which shall not exceed one-half of the capital stock."

Approved, December 27th, 1845.

"AN ACT to authorize the Central Railroad and Banking Company of Georgia to lease and work such Railroads as now connect, or may hereafter connect, with the Central Railroad, and to authorize the Board of Directors of such Railroad Companies as now have or may hereafter have their respective Railroads connecting with the said Central Railroad to make leases thereof for a term of years, or during the continuance of their respective Charters. Approved, January 22, 1852.

"Sec. 1. Be it enacted by the Senate and House of Representatives of the State of Georgia in General Assembly met, and it is hereby enacted by authority of the same, That it shall and may be lawful for the Central Railroad and Banking Company of Georgia to lease and work for such time and on such terms as may be agreed on by the parties interested, the Augusta and Waynesboro Railroad, the Milledgeville and Gordon Railroad, the Eatonton Branch Railroad, the South-Western Railroad, and such other Railroads as now connect or may hereafter connect with the Central

Railroad, and to collect, by suit or otherwise, the fares of travel and the charges of transportation on Railroads so leased.

"36. Sec. II. And be it further enacted by the authority aforesaid, That the respective Boards of Directors of the incorporated Companies owning the Railroads above mentioned, or owning such other Railroads as now connect or may hereafter connect with the Central Railroad, shall have power and authority so to lease to the Central Railroad and Banking Company of Georgia their respective Railroads for such term of time and on such other terms as they respectively may deem best.

"37. Sec. III. And be it further enacted by the authority aforesaid, That the locomotive engines, and other property, and the operatives of the said Central Railroad and Banking Company of Georgia, employed on such leased Railroads, shall have an enjoy the same protection as are granted to the property and operatives of the respective Companies hereby authorized to grant leases to the said Central Railroad and Banking Company of Georgia.

"38. Sec. IV. And be it further enacted by the authority aforesaid, That all laws and parts of laws militating against this Act, be, and the same are hereby repealed."